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358 - 21755

ANDREW LARSEN,

Plaintiff in Error.

vs.

ADOLPH BASIKOWSKI, (also known as A. SMITH), ELIZABETH BASIKOWSKI, (also known as Mrs. A. SMITH), and S. SINGDAHLSSEN,

Defendants in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

206 I.A. 1

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

Andrew Larsen brought suit against Adolph and Elizabeth Basikowski and S. Singdahlsen to recover \$296.22 for materials furnished and labor performed in constructing certain improvements on real estate located in Chicago.

The evidence discloses that the defendants, Adolph and Elizabeth Basikowski, were the joint owners of the real estate on which the improvements were made; that they let a contract to the defendant Singdahlsen for the construction of the improvements; that Singdahlsen afterwards sub-let a part of the work to plaintiff, who started work October 24, 1914; that in accordance with his contract plaintiff furnished labor and materials, and the work was finished November 24, 1914; that the contract price of said work and the reasonable value thereof was \$291.37, which was due and owing from the defendant Singdahlsen to plaintiff; that the owners of the premises

ADOLPH HASIKOWSKI

Plaintiff in Error

VERDICT TO

VS.

MUNICIPAL COURT

OF CHICAGO

ADOLPH HASIKOWSKI, (also known as A. HASIKOWSKI), ELIZABETH HASIKOWSKI, (also known as Mrs. A. HASIKOWSKI), and B. SING-
HASEN, Defendants in Error.

1. A. I. 008

THE COURT OF CHICAGO DELIVERED THE

OPINION OF THE COURT.

ANDREW LARSEN BROUGHT SUIT AGAINST ADOLPH

AND ELIZABETH HASIKOWSKI AND B. SINGHASEN TO RECOVER

\$236.82 FOR MATERIALS FURNISHED AND LABOR PERFORMED IN

CONSTRUCTING CERTAIN IMPROVEMENTS ON REAL ESTATE LOCATED

IN CHICAGO.

THE EVIDENCE DISCLOSED THAT THE DEFENDANTS,

ADOLPH AND ELIZABETH HASIKOWSKI, WERE THE JOINT OWNERS

OF THE REAL ESTATE IN WHICH THE IMPROVEMENTS WERE MADE;

THAT THEY LET A CONTRACT TO THE DEFENDANT SINGHASEN

FOR THE CONSTRUCTION OF THE IMPROVEMENTS; THAT SINGHASEN

AFTERWARDS ASSUMED A PART OF THE WORK AS PLAINTIFF, WHO

STARTED WORK OCTOBER 24, 1914; THAT IN ACCORDANCE WITH

THE CONTRACT PLAINTIFF FURNISHED LABOR AND MATERIALS, AND

THE WORK WAS FINISHED APPROXIMATELY 24, 1915; THAT THE TOTAL

TRUE PRICE OF SAID WORK AND THE RESPONSIBLE VALUE THEREOF

WAS \$231.87, WHICH WAS DUE AND OWING FROM THE DEFENDANT

SINGHASEN TO PLAINTIFF; THAT THE OWNERS OF THE PREMISES

paid the original contractor Singdahlsen for the work according to his contract without obtaining from him a statement in writing under oath of the names of the parties furnishing material and labor on the building. The defendant Singdahlsen having failed to pay the plaintiff, the latter served two notices of his lien on the owners of the premises, one on December 2, 1914, and another on or about January 18, 1915, both notices being within sixty days after the completion of the work.

The owners of the premises denied that any such notice had been served upon them. The court however found that the notice had been served, but held that plaintiff was entitled to recover only the amount paid to the original contractor after the service of the notice on them by the plaintiff; and as \$100 had been paid to the original contractor after the plaintiff had served his notice of mechanics lien, judgment was entered in favor of plaintiff for this amount. To reverse this judgment plaintiff has sued out this writ of error. Defendants in error have filed no brief in this court.

By section 21 of the Mechanic's Lien Act, plaintiff, the subcontractor was given a lien on the property improved by him, for the value of the materials furnished and services performed. Section 24 provides that subcontractors or parties furnishing labor or materials may at any time after making his contract with the contractor, and shall within sixty days after the completion thereof, cause a written notice of his claim to be personally served upon the owner or his agent. Section 5 makes it the duty of the contractor to give to the owner, and the duty of the

paid the original contractor, Jorgensen, for the work according to his contract without obtaining from him a statement in writing under oath of the names of the parties furnishing material and labor on the building. The defendant Jorgensen having failed to pay the plaintiff, the latter served two notices of his lien on the owners of the premises, one on December 2, 1914, and another on or about January 18, 1915, both notices being within sixty days after the completion of the work.

The owners of the premises denied that any such notice had been served upon them. The court however found that the notice had been served, but held that plaintiff was entitled to recover only the amount paid to the original contractor after the service of the notice on them by the plaintiff; and as this had been paid to the original contractor after the plaintiff had served his notice of mechanic's lien, judgment was entered in favor of plaintiff for this amount. To reverse this judgment plaintiff has sued out this writ of error. Defendants in error have filed no brief in this court.

By section 11 of the mechanic's lien act, plaintiff, the subcontractor, has given a lien on the property improved by him, for the value of the materials furnished and labor performed. Section 12 provides that such contractors or parties furnishing labor or materials may at any time after making his contract with the contractor, and within sixty days after the completion thereof, cause a written notice of his claim to be served upon the owner of the property. Section 13 makes it the duty of the contractor to give to the owner, and the duty of the

owner to require of the contractor, before the owner makes any payment, a statement in writing under oath, of the names of all parties furnishing materials and labor, and the amounts due or to become due to each. Section 32 provides that no payments to the contractor shall be regarded as rightfully made as against the subcontractors furnishing labor and materials, if made by the owner without obtaining from the contractor a statement in writing under oath, as provided in section 5. The owners of the premises having made payments to the original contractor without securing the verified statement provided for in section 5, are not relieved from paying the subcontractor. American Radiator Co. v. Blakie, 165 Ill. App. 404; Mueller Lumber Co. v. Bollinger, 160 Ill. App. 402.

Section 23 provides that the judgment shall recite the date from which the lien attached. Section 1 provides that the lien shall attach from the date of the contract. In the case of Zechman v. Feigenbaum, 163 Ill. App. 366, it was held that the failure to recite the date from which the lien attached in the judgment was reversible error. Section 21 provides that the subcontractor "shall have a lien for the value thereof with interest on such amount from the date the same is due."

The evidence shows that plaintiff entered into the contract October 24, 1914; that his work was completed November 24, 1914. We are therefore of the opinion that he was entitled to recover for the materials furnished and labor performed amounting to \$291.37 with interest thereon from the time this became due, November 24, 1914, at the rate of five per cent per annum, and that the lien attached from

owner to require of the contractor, before the owner makes any payment, a statement in writing under oath, of the names of all parties furnishing materials and labor, and the amount due or to become due to each. Section 20 provides that no payments to the contractor shall be regarded as rightfully made as against the subcontractors furnishing labor and materials, if made by the owner without obtaining from the contractor a statement in writing under oath, as provided in section 2. The owner of the premises having made payments to the original contractor without securing the verified statement provided for in section 2, are not relieved from paying the subcontractor. American Radiator Co. v. Barker, 103 Ill. App. 404; Amelior Lumber Co. v. Hollister, 103 Ill. App. 402.

Section 23 provides that the judgment shall recite the date from which the lien attached. Section 1 provides that the lien shall attach from the date of the contract. In the case of Goodman v. Weinshap, 103 Ill. App. 386, it was held that the failure to recite the date from which the lien attached in the judgment was reversible error. Section 21 provides that the subcontractor "shall have a lien for the value thereof with interest on such amount from the date the same is due."

The evidence shows that plaintiff entered into the contract October 24, 1914; that his work was completed November 24, 1914. He was the holder of the claim from the date he was entitled to receive for the materials furnished and labor performed amounting to \$221.77 with interest thereon from the time this became due, November 24, 1914, at the rate of five per cent per annum, and that the lien attached from

the date of his contract, October 24, 1914.

The judgment of the Municipal Court must be reversed, but as all the facts are before us, the cause will not be remanded, but judgment will be entered in this court in favor of the plaintiff for the amount due, \$291.37, with interest thereon at five per cent per annum from November 24, 1914, and that said lien attached as of October 24, 1914.

JUDGMENT REVERSED AND JUDGMENT
IN THIS COURT.

the date of his contract, October 24, 1914.

The judgment of the Circuit Court must be reversed, but as all the facts are before us, the cause will not be remanded, but judgment will be entered in this court in favor of the plaintiff for the amount due, \$201.37, with interest thereon at five per cent per annum from November 24, 1914, on that date then attached as of October 24, 1914.

JUDGMENT REVERSED AND JURY
IN THIS CASE.

634 - 22032

WERNER BROTHERS EXPRESS &
STORAGE COMPANY and NATIONAL
LIFE INSURANCE CO. of U.S.A.,

Appellants,

vs.

JAMES DONOVAN and CLARA H.
WOODWARD,

Appellees.

APPEAL FROM

SUPERIOR COURT,
COOK COUNTY.

206 I.A. 11

MR. PRESIDING JUSTICE O'CONNOR delivered the
opinion of the court.

By this appeal Werner Brothers Express & Storage
Company and National Life Insurance Co. of U. S. A. seek
to reverse a decree of the Superior Court of Cook County,
dismissing the original bill of the Storage Company and
the cross-bill of the Insurance Company and granting the
prayer of the cross-bill of Clara H. Woodward.

The facts, so far as material, are as follows:
Appellee James Donovan borrowed money from the Insurance
Company and secured the same by a mortgage on improved
real estate in Chicago. Default being made by Donovan,
the Insurance Company obtained a decree of foreclosure,
from which Donovan prosecuted an appeal to this court,
where the decree was affirmed (National Life Insurance
Co. v. Donovan, Gen. No. 14090, Appellate Court, First
Dist.) and a further appeal was prosecuted to the Supreme
Court where the judgment of this court was affirmed.
National Life Insurance Co. v. Donovan, 238 Ill. 283.
Afterwards the property was sold in accordance with the

WERNER BROTHERS EXPRESS &
STORAGE COMPANY and NATIONAL
LIFE INSURANCE CO. of U.S.A.,

APPEAL FROM

Appellants,

SUPERIOR COURT,

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vs.

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WOODWARD,

Appellees.

206 I.A. 11

MR. PRESIDING JUSTICE O'CONNOR delivered the

opinion of the court.

By this appeal Werner Brothers Express & Storage Company and National Life Insurance Co. of U. S. A. seek to reverse a decree of the Superior Court of Cook County, dismissing the original bill of the Storage Company and the cross-bill of the Insurance Company and granting the prayer of the cross-bill of Clara E. Woodward.

The facts, so far as material, are as follows:

Appellee James Donovan borrowed money from the Insurance Company and secured the same by a mortgage on improved real estate in Chicago. Default being made by Donovan, the Insurance Company obtained a decree of foreclosure, from which Donovan prosecuted an appeal to this court, where the decree was affirmed (National Life Insurance Co. v. Donovan, Gen. No. 14090, Appellate Court, First Dist.) and a further appeal was prosecuted to the Supreme Court where the judgment of this court was affirmed. National Life Insurance Co. v. Donovan, 238 Ill. 288. Afterwards the property was sold in accordance with the

decree and a master's deed issued to the Insurance Company. Prior to the sale, appellee James Donovan had leased the property to Nellie D. Driver, who conducted a boarding house. She fell behind in the payment of rent and Donovan levied a distress warrant on the furniture owned by Mrs. Driver for the unpaid rent amounting to \$4200. About a year prior to the levy Mrs. Driver executed a chattel mortgage on the furniture to secure the payment of \$1800 which she had borrowed from appellee Clara H. Woodward. Shortly after the levy by Donovan, Mrs. Driver went into bankruptcy, and the American Trust and Savings Bank was appointed trustee and took possession of the furniture. Afterwards an order was entered in the bankruptcy proceedings directing the trustee to turn the property back to Donovan. After the sale of the real estate under the foreclosure and during the period of redemption, Donovan leased the premises and furniture to Mrs. Mary Rooney, who took possession and conducted a boarding house on the premises. After Mrs. Driver had gone into bankruptcy, Mrs. Woodward, appellee, foreclosed the chattel mortgage on the furniture. Donovan was made a party to this suit and claimed a first lien. The trustee in bankruptcy was also made a party. The Circuit Court entered a decree of foreclosure awarding Mrs. Woodward a lien on the property superior to that claimed by Donovan. Donovan alone appealed to this court, where the decree of the Circuit Court was affirmed. Woodward v. Donovan, 167 Ill. App. 503. Before this affirmance, the Insurance Company obtained a master's deed to the real estate and demanded possession from the tenant, Mrs. Rooney. She asked time to consult her attorney, which was granted, and the next day the Insurance Company and Mrs. Rooney entered into a written lease for the premises

and Mrs. Rooney entered into a written lease for the premises which was granted, and the next day the Insurance Company tenant, Mrs. Rooney. She asked time to consult her attorney, deed to the real estate and demanded possession from the this affidavit, the Insurance Company obtained a master's affirmed. Woodward v. Donovan, 187 Ill. App. 503. Before to this court, where the decree of the Circuit Court was superior to that claimed by Donovan. Donovan alone appealed foreclosure awarding Mrs. Woodward a lien on the property also made a party. The Circuit Court entered a decree of and claimed a first lien. The trustee in bankruptcy was on the furniture. Donovan was made a party to this suit Mrs. Woodward, appellee, foreclosed the chattel mortgage premises. After Mrs. Driver had gone into bankruptcy, who took possession and conducted a boarding house on the leased the premises and furniture to Mrs. Mary Rooney, closure and during the period of redemption, Donovan Donovan. After the sale of the real estate under the fore- ings directing the trustee to turn the property back to Afterwards an order was entered in the bankruptcy proceed- appointed trustee and took possession of the furniture. bankruptcy, and the American Trust and Savings Bank was Shortly after the levy by Donovan, Mrs. Driver went into which she had borrowed from appellee Clara H. Woodward. mortgage on the furniture to secure the payment of \$1800 year prior to the levy Mrs. Driver executed a chattel Driver for the unpaid rent amounting to \$4200. About a levied a distress warrant on the furniture owned by Mrs. house. She fell behind in the payment of rent and Donovan property to Nellie D. Driver, who conducted a boarding Prior to the sale, appellee James Donovan had leased the decree and a master's deed issued to the Insurance Company.

for one month, and shortly thereafter, September 10, 1910, another lease was entered into, which by its terms would expire April 30, 1911. This lease expressly excluded the furniture, and the Insurance Company expressly disclaimed any interest in it. The lease provided that it might be canceled upon thirty days notice. After the execution of the lease by Mrs. Rooney for the building, she entered into a separate arrangement for the use of the furniture with Donovan, paying him for the use thereof. On September 19, 1910, the Insurance Company entered into a written contract for the sale of the real estate, whereby it agreed to give possession on or before October 21, 1910. On October 20, 1910, a representative of the Insurance Company went to the premises and found two men in the house who had been there for a day or two, representing appellee Donovan, and claimed to be acting as custodians of the furniture, but made no claim to the real estate. The men were told that the Insurance Company had sold the property and possession must be delivered the following day, and therefore it was necessary that the furniture be removed. Donovan's representatives stated that the furniture must remain in the house. Thereupon, the Insurance Company notified Mrs. Woodward's attorneys that the real estate had been sold and possession must be delivered the next day and asked if they would remove and take charge of the furniture, which they refused to do. The Insurance Company then suggested putting the furniture in a barn on the premises, but counsel for Mrs. Woodward objected, stating that it was not a safe place. The Insurance Company then stated that it would store the furniture, and counsel for Mrs. Woodward replied that the responsibility for the removal must rest with the

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Insurance Company and not with Mrs. Woodward. The Insurance Company then secured the services of appellant Werner Brothers Express and Storage Company who removed the furniture to its warehouse. The removal of the furniture was completed about five o'clock in the morning of October 21st. The custodians representing Donovan, and also representatives of the Insurance Company remained in the premises until October 21st. On this date there was an altercation between Donovan and the representative of the Insurance Company, Donovan insisting that the furniture be returned to the premises at once, which was refused, and Donovan and his custodians were ordered from the premises and left under protest.

The Storage Company filed its bill praying that it be decreed to have a first lien on the furniture for its reasonable charges for removing and storing the furniture. Mrs. Woodward filed a cross-bill claiming a first lien, and Donovan also contends that he is entitled to a first lien on the furniture.

While the suit was pending, by agreement of the parties, a receiver was appointed and the property sold for \$1022.51. The receiver reported the sale to the court and after deducting the expense, there was a balance in his hands of \$726.26. This report was approved. The report disclosed that there was more than \$1500 still due Mrs. Woodward under her decree of foreclosure; that there was due Donovan for back rent more than \$4200, and that there was due the Storage Company for removal and storage of the furniture more than \$2000. The court decreed that neither of the parties had any claim to the funds in the hands of

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the receiver as against Mrs. Woodward.

Appellee Donovan contends that the decree is correct in all respects, except that he should have been given a lien on the proceeds in the hands of the receiver superior to the lien of Mrs. Woodward. This contention is obviously untenable, as this court has determined this contention adversely to him in the case of Donovan v. Woodward, supra.

Appellants contend that the Storage Company was entitled to a first lien for the reason that under the facts it was necessary that the furniture be taken care of so as to preserve it; that when it was removed from the premises, it was raining, and therefore it was necessary that the Insurance Company have the same stored; that the Insurance Company was in peaceable possession of the building through its tenant, Mrs. Rooney, for some time prior to the removal of the furniture; that it had terminated her lease by giving the notice required; that as there was no one claiming to be the owner of the furniture and neither of the two parties claiming a lien would remove the same, it was proper under the circumstances for the Insurance Company to remove the property and to store it. The evidence clearly shows that the Insurance Company was by its tenant in peaceable possession of the building; that it had terminated the tenant's lease, and she is in no way complaining; that the trustee in bankruptcy of Nellie D. Driver, the former owner of the furniture expressly disclaimed any interest in the furniture; that the representatives of Donovan knew that the furniture was to be removed, and after it was removed, appellee Donovan insisted that it be returned to the building; that appellee Woodward did not see fit to take the

the receiver as against Mrs. Woodward.

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responsibility of removing the furniture as to the question of the priority of ^{her}lien over that of Donovan's was then pending in this court. We are, therefore, of the opinion that the Insurance Company was justified in removing the furniture. Counsel for appellee Woodward states in his brief that while in some states of the union "a landlord may recover possession of the demised premises, when entitled to them without recourse to law, such is not the law in this state, unless the lease expressly provides for a forcible expulsion, with or without process of law."

In the case at bar, the lease does contain such a provision. It provides that the lease may be terminated by lapse of time or by giving thirty days notice, etc.; that if the lease is terminated, "it shall be lawful for the party of the first part (landlord) or the legal representative of said party at any time thereafter, at the election of said first party, or the legal representative thereof, * * * to re-enter said demised premises * * * with or without process of law, and the said party of the second part or any person or persons occupying the same, to expel, remove and put out, using such force as may be necessary so to do."

In the case of Turn Verein Garfield v. Vöcke, 131 Ill. App. 528, where furniture was removed under similar circumstances, the action of the landlord in removing the same was held justified.

The evidence tends to show that when the Insurance Company informed counsel for Mrs. Woodward that the

responsibility of removing the furniture as to the question of the priority of ^{her} lien over that of Donovan's was then pending in this court. We are, therefore, of the opinion that the Insurance Company was justified in removing the furniture. Counsel for appellee Woodward states in his brief that while in some states of the union "a landlord may recover possession of the demised premises, when entitled to them without recourse to law, such is not the law in this state, unless the lease expressly provides for a forcible expulsion, with or without process of law."

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In the case of Turn Vetsin Garfield v. Volske, 131 Ill. App. 523, where furniture was removed under similar circumstances, the action of the landlord in removing the same was held justified.

The evidence tends to show that when the Insurance Company informed counsel for Mrs. Woodward that the

furniture was about to be removed, her counsel insisted that if afterwards this court affirm the decree of foreclosure of the chattel mortgage in Mrs. Woodward's favor, he would expect that the Insurance Company would return the property to him. In the case of Storns v. Smith, 137 Mass. 301, the court held that where personal property subject to a mortgage was removed and stored in a warehouse, of which removal the mortgagee was notified and made no objection, that the mortgagee could recover the property without paying the storage charges. Under the facts in this case, as disclosed by the evidence, we are clearly of the opinion that it would be unjust and inequitable to require that the storage charges be paid to the Storage Company and thus deprive appellee Mrs. Woodward of her lien on the property, and this will be no hardship on the Storage Company, as it will have its claim under its contract against the Insurance Company.

The decree of the Superior Court of Cook County, in so far as it awards ~~awarding~~ Mrs. Woodward a first lien on the proceeds in the hands of the receiver is correct and is affirmed.

AFFIRMED.

furniture was about to be removed, her counsel insisted that if afterwards this court affirm the decree of foreclosure of the chattel mortgage in Mrs. Woodward's favor, he would expect that the Insurance Company would return the property to him. In the case of Storrs v. Galt, 137 Mass. 301, the court held that where personal property subject to a mortgage was removed and stored in a warehouse, or which removal the mortgagee was notified and made no objection, that the mortgagee could recover the property without paying the storage charges. Under the facts in this case, as disclosed by the evidence, we are clearly of the opinion that it would be unjust and inadvisable to require that the storage charges be paid to the Storage Company and thus deprive appellee Mrs. Woodward of her lien on the property, and this will be no hardship on the Storage Company, as it will have its claim under its contract against the Insurance Company.

The decree of the Superior Court of Cook County, in so far as it awards ~~to Mrs. Woodward~~ a first lien on the proceeds in the hands of the receiver is correct and is affirmed.

AFFIRMED.

641 - 22039

ROBINSON & CO.,
a corporation,

Appellee,

vs.

ANDREW MARR, Appeal of
CLAY, ROBINSON & CO.,
garnishees,

Appellant.

APPEAL FROM

CIRCUIT COURT,

COCK COUNTY.

206 I.A. 12

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

By this appeal Clay, Robinson & Co., garnishees, seek to reverse a judgment against them for \$2,179.39. We regret to say that this case has been before this court on three former occasions, 112 Ill. App. 332; 145 Ill. App. 178; 181 Ill. App. 605, where the facts are set forth, and it is therefore unnecessary to repeat them.

The principal controversy on the trial was whether the money in the hands of the garnishees belonged to the defendant Andrew Marr, or to other parties, the plaintiff contending the former and the garnishees the latter. The trial court found in favor of the plaintiff's contention, and we think this finding is clearly justified by the evidence. Plaintiff, to sustain his contention, read in evidence two stipulations entered into between the parties. Counsel for the garnishees complain that these stipulations were improperly read in evidence. These same stipulations were offered in evidence on the third trial and excluded. This court held that such exclusion was error. (181 Ill. App. 605-614). That their admission was proper has therefore been determined by this court.

ROBINSON & CO.,
a corporation,

appellee,

ALBANY, N.Y.

ALBANY, N.Y.

JOHN C. SMITH,

ANDREW HARR, Appellant of
JAY, ROBINSON & CO.,
appellee,

Appellant.

2001.1.12

MR. PRESIDING JUSTICE O'CONNOR delivered the

opinion of the court.

By this appeal Jay, Robinson & Co., appellees, seek to reverse a judgment against them for \$1,175.00. We regret to say that this case has been before this court on three former occasions, 112 Ill. App. 322; 145 Ill. App. 178; 181 Ill. App. 605, where the facts are set forth, and it is therefore unnecessary to repeat them.

The principal controversy on the trial was whether the money in the hands of the appellees belonged to the defendant Andrew Harr, or to other parties, the plaintiff contending the former and the appellees the latter. The trial court found in favor of the plaintiff's contention, and we think this finding is clearly justified by the evidence. Plaintiff, to sustain his contention, read in evidence two stipulations entered into between the parties. Counsel for the appellees admitted that these stipulations were improperly read in evidence. These same stipulations were offered in evidence on the first trial and excluded. This court said that such exclusion was error. (181 Ill. App. 605-614). That their admission

The garnishees also contend that it was erroneous to permit the plaintiff to read in evidence an interrogatory and answer of the garnishees thereto; that the issues were different from those involved in the first trial of the case in which the answer was made, in that the garnishees had filed a new answer. The first answer was verified by one of the garnishees and stated that the money belonged to Andrew Marr. The new answer was on information and belief and verified by counsel for the garnishees. This answer indicated that the money in the hands of the garnishee belonged to other parties than the defendant Andrew Marr. We think that the court properly admitted the answer of the garnishees to be read in evidence.

It is further contended that under the law the judgment creditor has no greater rights against the garnishees than the defendant, and that as the defendant Marr testified in a deposition that the money in the hands of the garnishees did not belong to him, but that it was the property of other persons, this would have estopped Marr to assert any claim against the garnishees, and for this reason would also estop the plaintiff. The record discloses that this testimony of Marr was excluded by the court, and it is manifest that the ruling was proper. This was the very issue to be decided by the trial judge and not by the witness. Furthermore it appears that each of these other parties who the garnishees claim were interested in the money in their hands were properly notified but entered no appearance and were defaulted. This concludes them. Radzinski v. Fry, 111 Ill. App. 645; sections 11 and 12, chapter 62, R. S.

The garnishees complain that the judgment is

The Garnishee also contends that it was erroneous to permit the plaintiff to rely on evidence in interrogatory and answer of the garnishee's interest; that the interest was different from those involved in the first trial of the case in which the answer was made, in that the garnishee had filed a new answer. The first answer was verified by one of the garnishees and stated that the money belonged to Andrew Hart. The new answer was on information and was filed and verified by counsel for the garnishee. This answer indicated that the money is in the hands of the garnishee, belonged to other parties than the defendant Andrew Hart. We think that the court properly admitted the answer of the garnishee to be read in evidence.

It is further contended that under the law the judgment creditor has no greater rights against the garnishee than the defendant, and that as the defendant was satisfied in a transaction that the money in the hands of the garnishee did not belong to him, but that it was the property of other persons, this would have entangled him to assert any claim against the garnishee, and for this reason would also enter the plaintiff. The record discloses that this testimony of Hart was excluded by the court, and it is manifest that the ruling was proper. This was the very issue to be decided by the trial judge and not by the appellate court. Furthermore it appears that each of these other parties who the garnishee claims were interested in the money in their hands were properly notified but entered no appearance and were defaulted. This case arises from Hart v. Hart, 111 Ill. App. 663; motions for judgment on 12, October 22, 1911.

erroneous in that it should have been for the amount found to be due from the garnishees to the defendant, while the judgment was only for the amount found due from the defendant to the plaintiffs, which was less than the amount due from the garnishees to the defendant. The evidence shows that after the writ was served on the garnishees they paid the entire amount in their hands to the defendant. They cannot therefore complain that the judgment entered against them was for the amount due to the garnisheeing creditor and not for the full amount originally due to the judgment debtor. The judgment was in proper form. L. S. & M. S. Ry. Co. v. Scott, 67 Ill. App. 92.

The judgment of the Circuit Court of Cook County is affirmed.

AFFIRMED.

extortion in that it should have been for the amount
found to be due from the garnishees to the defendant,
while the judgment was only for the amount found due
from the defendant to the plaintiffs, which was less
than the amount due from the garnishees to the defend-
ant. The evidence shows that after the writ was served
on the garnishees they paid the entire amount in their
hands to the defendant. They cannot therefore complain
that the judgment entered against them was for the amount
due to the garnishees creditor and not for the full
amount originally due to the judgment debtor. The judg-
ment was in proper form. I. S. & M. S. B. Co. v. Scott.

57 Ill. App. 92.

The judgment of the Circuit Court of Cook County

is affirmed.

THOMAS J.

WESTERN IRON CO.,
a corporation,
In the Matter of a Petition of
JOEL C. CARLSON to Enforce
Attorney's Lien,

Defendant in Error,

vs.

JOHN J. BRITTAIN, et al.,

Plaintiffs in Error)

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

206 I.A. 14

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

Joel C. Carlson filed his petition seeking to enforce his attorney's lien against John J. Brittain and Milton B. Bushnell, who were defendants in a suit brought against them by the Western Iron Company, a corporation. There was a judgment in favor of the petitioner for \$175 against Milton B. Bushnell, to reverse which this writ of error is prosecuted.

It appears that the Western Iron Company, by its attorney the petitioner, brought suit against Brittain and Bushnell in the Municipal Court. There was a judgment in favor of the plaintiff and against the defendants. Afterwards plaintiff's attorney, the petitioner, served notice on the defendant Bushnell claiming an attorney's lien in the sum of \$75. Subsequently another notice of the same character was served on Bushnell in which the petitioner claimed a lien for \$244.55. Each of these notices were addressed to both defendants, but only Bushnell was served. Defendants entered a special appear-

WESTERN IRON CO.,
a corporation,
in the matter of a petition of
JOEL C. CARLSON to enforce
Attorney's fees.

RETURN TO

MUNICIPAL COURT
OF CHICAGO.

Defendant in Error,

vs.

JOHN J. BUSHNELL, et al.,

Plaintiffs in Error.

3061 A. 14

MR. PRESIDING JUSTICE O'BRIEN delivered the

opinion of the court.

JOEL C. CARLSON filed his petition seeking
to enforce his attorney's fees against JOHN J. BUSHNELL
and ALFRED B. BUSHNELL, who were defendants in a suit
brought against them by the Western Iron Company, a
corporation. There was a judgment in favor of the peti-
tioner for \$175 against ALFRED B. BUSHNELL, to reverse
which this writ of error is prosecuted.

It appears that the Western Iron Company, by
its attorney the petitioner, brought suit against BUSHNELL
and BUSHNELL in the Municipal Court. There was a judg-
ment in favor of the plaintiff and against the defendants.
Afterwards plaintiff's attorney, the petitioner, served
notice on the defendant BUSHNELL claiming an attorney's
lien in the sum of \$75. Subsequently another notice of
the same character was served on BUSHNELL in which the
petitioner claimed a lien for \$14.55. Each of these
notices were addressed to both defendants, but only
BUSHNELL was served. Defendant entered a special appear-

ance and moved to dismiss, which was overruled. They then filed their answer and the matter came on for hearing before the court. It was expressly stipulated between the parties that the only questions to be decided were the amount of petitioner's fees and whether he was entitled to an attorney's lien for services rendered by him to the plaintiff in other cases prior to the time he rendered services in this case. The court held that he was not entitled to a lien for services rendered in other cases. Therefore the only questions that can be raised in this court are: (1) the jurisdiction of the trial court to hear and determine the matter, and (2) the amount of petitioner's fees in this case. Other questions, however, are urged, but on account of the stipulation, they are not properly before us.

The defendant contends that the court was without jurisdiction of the defendants, for the reason that the judgment had been paid and satisfied prior to the filing of the petition; that unless proceedings are pending at the time the petition is filed, jurisdiction of the defendants cannot be obtained unless summons is issued and served upon them. This question was waived by the defendants by filing their answer and contesting the case on its merits. If the defendant desired to preserve this question, he should have stood on his special appearance.

Defendant next contends that the judgment is excessive; that in no event should it exceed \$75. It appears from the evidence that after the notices of lien were served on the defendant, the judgment was paid and \$75 reserved and tendered to petitioner and a receipt in full demanded. The evi-

know and moved to disprove, it was overruled. They then filed their answer and the latter case on the hearing before the court. It was explicitly stipulated between the parties that the only questions to be decided were the amount of petitioner's fees and whether he was entitled to an attorney's lien for services rendered by him to the plaintiff in either case prior to the time he rendered services in this case. The court held that he was not entitled to a lien for services rendered in other cases. Therefore the only question that can be raised in this court was: (1) the jurisdiction of the trial court to hear and determine the matter, and (2) the amount of petitioner's fees in this case. Other questions, however, are raised, but on account of the stipulation, they are not properly before us.

The defendant contends that the court was without jurisdiction of the defendant, for the reason that the judgment had been paid and satisfied prior to the filing of the petition; that unless proceedings are pending at the time the petition is filed, jurisdiction of the defendant cannot be obtained unless summons is issued and served upon them. This question was raised by the defendant by filing their answer and opposing the case on its merits. If the defendant desired to preserve this question, he should have stood on his special appearance.

Defendant next contends that the judgment is executory; that in no event should it be set aside. It appears from the evidence that after the motion of lien was served on the defendant, the judgment was paid and was reversed and transferred to petitioner and a receipt is full in return. The evi-

dence further shows that in addition to the \$75, the petitioner claims attorney's fees for services rendered after the procuring of the judgment; that his charge of \$75 was the amount he claimed for obtaining the judgment; that after the judgment was entered, the defendants filed a stay bond which stayed the execution on the judgment for ninety days; that during this period the petitioner at the request of plaintiff performed services in endeavoring to secure payment of the judgment; that after the expiration of the ninety days, and before the payment of the judgment, other services were rendered by the petitioner with the same object in view. It is contended by the defendant that the services rendered by the petitioner during the ninety day period should not have been rendered, as execution on the judgment could not be enforced, and therefore they were of no value. We cannot concur in this view. It might well be that after the stay bond was filed services might properly be rendered by the petitioner looking toward the payment of the judgment, other than obtaining execution or taking other legal steps. We, however, are of the opinion that a great part of the services testified to by the petitioner are such that recovery could not be had for them. But even if no allowance were made for a great part of the services which he rendered during this period of time, yet the judgment would not be excessive for the services which were properly rendered. In this view of the case, it will be unnecessary for us to pass upon the motion made by the petitioner to strike the stenographic report from the record.

The judgment of the Municipal Court of Chicago is affirmed.

dence further shows that in addition to the \$75, the petitioner claims attorney's fees for services rendered after the procuring of the judgment; that the amount he claims for obtaining the judgment; that after the judgment was entered, the defendant filed a stay bond which stayed the execution on the judgment for ninety days; that during this period the petitioner at the request of plaintiff performed services in endeavoring to secure payment of the judgment; that after the expiration of the ninety days, and before the payment of the judgment, other services were rendered by the petitioner with the same object in view. It is contended by the defendant that the services rendered by the petitioner during the ninety day period should not have been rendered, as execution on the judgment could not be enforced, and therefore any work of no value. We cannot concur in this view. It might well be that after the stay bond was filed services might properly be rendered by the petitioner looking toward the payment of the judgment, after obtaining execution or taking other legal steps. We, however, are of the opinion that a great part of the services testified to by the petitioner are such that recovery could not be had for them. But even if no allowance were made for a great part of the services which he rendered during this period of time, yet the judgment would not be excessive for the services which were properly rendered. In this view of the case, it will be unnecessary for us to pass upon the action made by the petitioner to revoke the stenographic report from the record.

129 - 22072

MARIAN S. LINDEM,

Defendant in Error.

vs.

KATHARINA SAUERLAND,

Plaintiff in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

206 I.A. 15

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

Marian S. Lindem brought suit in the Municipal Court of Chicago against Katharina Sauerland to recover \$412.80 with interest thereon. The case was tried before the court without a jury and a judgment entered in favor of the plaintiff for \$425.18, to reverse which this writ of error is prosecuted.

It appears that plaintiff had performed services and loaned money to Christian Eckel, brother of the defendant; that afterwards said Eckel died testate, and the defendant was appointed executrix of his estate; that one Richard H. S. Miller, an attorney at law, represented the defendant individually and as executrix; that plaintiff had a claim against the estate for \$1,000 and spoke to Miller about it. Plaintiff testified that she went to Miller's office and told him she had asked the defendant for the money; that thereupon Miller stated that if plaintiff would pay him ten per cent as a commission he would collect the \$1,000; that plaintiff complained about the amount of the charge and Miller told her it was the regular

MARIA S. LINDEN,

Defendant in Error,

vs.

vs.

KATHARINE BANERMAN,

Plaintiff in Error.

CHICAGO, ILL.

OF CHICAGO.

2001.A.15

MR. PRESIDING JUDGE O'CONNOR delivered the

opinion of the court.

Maria S. Linden brought suit in the Circuit

Court of Chicago against Katharine Banerman to recover \$412.50 with interest thereon. The case was tried before the court without a jury and a judgment entered in favor of the plaintiff for \$425.18, to reverse which this writ of error is prosecuted.

It appears that plaintiff had performed services and loaned money to defendant, brother of the defendant; that afterwards said brother died testate, and the defendant was appointed executrix of his estate; that the defendant E. S. Miller, an attorney at law, represented the defendant individually and as executrix; that plaintiff had a claim against the estate for \$1,000 and spoke to Miller about it. Plaintiff testified that she went to Miller's office and told him she had asked the defendant for the money; that thereafter Miller stated that if plaintiff would pay his tax for one as a commission he would collect the \$1,000; that plaintiff complied with the amount of the charge and Miller told her it was the regular

collection fee, and thereupon plaintiff said she would draw only \$500. Miller thereupon prepared a written memorandum dated December 19, 1913 and signed by himself and plaintiff, which provided that he was to collect the "sum due Miss Lindem from Eckel estate and Miss Lindem to pay as fee for services a sum equal to 10 (ten) per cent. This agreement is made subject to the approval of Mrs. Sauerland executrix of estate." A few days afterwards, plaintiff again called on Miller at his office, and he gave her \$500, stating that he collected \$555.55 and deducted \$55.55 for his fee. She further testified that she only employed Miller to collect this \$500 and not the balance.

Upon payment of this \$500 a written agreement dated December 22, 1913, was entered into between plaintiff and defendant. This agreement provided, inter alia, that the defendant individually would pay plaintiff \$1,000 in full of all claims plaintiff had against the defendant or the estate; recited the payment of the \$555.55 and stated there was a balance due of \$412.30. Plaintiff's suit is based on this written agreement.

The affidavit of defense admits the execution of the contract; that the defendant was ready, able and willing to pay the sum mentioned, but alleges that there were certain counter claims which the defendant individually and as executrix had against the plaintiff; that plaintiff had during the lifetime of Christian Eckel taken chattels belonging to him, the value of which defendant sought to set off; that the amount of this set-off was agreed upon between the parties and afterwards defendant paid Miller, as attorney for the plaintiff, the balance in full and received a receipt therefor.

collection fee, and entered on plaintiff's bill the words
"gross only \$300." Miller thereupon prepared a written
memorandum dated December 10, 1913 and signed by him-
self and plaintiff, which provided that he was to collect
the "sum due" also known from Fokel estate and Miss Linden
to pay as fee for services a sum equal to 10 (ten) per cent.
This agreement is made subject to the approval of Mrs.
Underland executrix of estate." A few days afterwards,
plaintiff again called on Miller at his office, and he gave
her \$50, stating that he collected \$350.55 and deducted
\$35.55 for his fee. She further testified that she only
employed Miller to collect this \$500 and not the balance.
Upon payment of this \$500 a written agreement
dated December 22, 1913, was entered into between plaintiff
and defendant. This agreement provided, inter alia, that
the defendant individually would pay plaintiff \$1,000 in
full of all claims plaintiff had against the defendant or
the estate; recited the payment of the \$350.55 and stated
there was a balance due of \$412.60. Plaintiff's suit is
based on this written agreement.
The affidavit of defense admits the execution of
the contract; that the defendant was ready, able and will-
ing to pay the sum mentioned, but alleges that there were
certain counter claims which the defendant individually and
an executrix had against the plaintiff; that plaintiff had
during the lifetime of defendant Fokel taken certain prop-
erty to him, the value of which defendant sought to recov-
er; that the amount of said recoup was agreed upon between the
parties and afterwards defendant paid Miller, as attorney
for the plaintiff, the balance in full and received a re-
ceipt therefor.

After the case was called for trial Miller stated to the court that he was only a witness in the case and that the attorney for the defendant was engaged before the Industrial Board and moved for a postponement. This was after the parties had announced that they were ready for trial. The court overruled the motion and Miller acted as attorney for the defendant and testified in the case in her behalf.

He testified in substance that plaintiff spoke to him a number of times in Winnetka about her claim for \$1,000; that afterwards plaintiff called at his office and asked him to look after the matter for her, which he refused to do, "telling her that there was a diversity of interest and that I could not represent her as well as my client;" that she then offered him ten per cent of the amount collected; that afterwards he talked to the defendant and explained to her that plaintiff was anxious to obtain some of the money before the matter was adjusted in the Probate Court, and stated that if the defendant would make a payment he would refund to her one-half of his fee; that he then collected \$555.55, took out ten per cent and gave one-half of the same to the defendant. He further testified that shortly after this payment plaintiff went to Wisconsin; that he wrote her on many occasions urging her to come in and get her money; that he received replies from the plaintiff stating that she was unable to return; that more than a year afterwards when plaintiff did return she called at his office, and he discussed the matter with her for about three hours; that he told her she had some personal property which belonged to Christian Eckel in his lifetime, for which

After the case was called for trial Miller stated to the court that he was only a witness in the case and that the attorney for the defendant was engaged before the Industrial Board and moved for a postponement. This was after the parties had announced that they were ready for trial. The court overruled the motion and Miller asked an attorney for the defendant and testified in the case in her behalf.

He testified in substance that plaintiff spoke to him a number of times in January about her claim for \$1,000; that afterwards plaintiff called at his office and asked him to look after the matter for her, which he refused to do, "telling her that there was a diversity of interest and that I could not represent her as well as my client;" that she then offered him ten per cent of the amount collected; that afterwards he talked to the defendant and explained to her that plaintiff was anxious to obtain some of the money before the matter was adjusted in the Probate Court, and stated that if the defendant would make a payment he would return to her one-half of his fee; that he then collected \$550.00, took out ten per cent and gave one-half of the same to the defendant. He further testified that shortly after this payment plaintiff went to Wisconsin; that he wrote her on many occasions urging her to come in and get her money; that he received replies from the plaintiff stating that she was unable to return; that more than a year afterwards when plaintiff did return she called at his office, and he discussed the matter with her for about three hours; that he told her she had some personal property which belonged to Gustafson Hotel in its lifetime, for which

some deduction should be made, and that finally a satisfactory agreement was reached whereby certain deductions were made; that afterwards he saw the defendant and told her of the arrangements he had made with the plaintiff, and after deducting the amounts agreed upon, he received the balance of \$383.99 and gave the defendant a receipt in full as agent of the plaintiff.

The defendant contends that under the written agreement made by Miller and plaintiff December 19, 1913, Miller was authorized to collect plaintiff's claim in her behalf; that "if the agreement between plaintiff and Miller is sufficient to constitute Miller the plaintiff's agent to make the collection, there is an end to the case," as Miller has collected the balance and receipted in full.

There is no evidence in the record that Miller ever turned over to the plaintiff the balance of the claim which he claims to have collected as her agent. The uncontradicted evidence is that Miller, an attorney at law, was at all times representing the defendant, individually and as executrix of the estate; that he divided the fees which he received from the plaintiff with the defendant; that after the first payment was made to him of \$555.55 he drew a contract upon which this suit is based, wherein it was stated that there was a balance due of \$412.80; that after the plaintiff went to Wisconsin he repeatedly wrote her requesting her to come in and receive her money, and yet, when she finally did come in a year later, in place of giving her the money, he sought to set off counter claims for matters which were in existence in the lifetime of the deceased and long before the contract on which this

some deduction should be made, and that finally a satisfactory agreement was reached whereby certain deductions were made; that afterwards he saw the defendant and told her of the arrangements he had made with the plaintiff, and after deducting the amount agreed upon, he received the balance of \$383.99 and gave the defendant a receipt in full as agent of the plaintiff.

The defendant contends that under the written agreement made by Miller and plaintiff December 19, 1913, Miller was authorized to collect plaintiff's claim in her behalf; that "if the agreement between plaintiff and Miller is sufficient to constitute Miller the plaintiff's agent to make the collection, there is an end to the case," as Miller has collected the balance and received in full.

There is no evidence in the record that Miller ever turned over to the plaintiff the balance of the claim which he claims to have collected as her agent. The undisputed evidence in that Miller, an attorney at law, was at all times representing the defendant, individually and as executor of the estate; that he divided the fees which he received from the plaintiff with the defendant; that after the first payment was made to him of \$383.99 he drew a contract upon which this sum is based, wherein it was stated that there was a balance due of \$412.00; that after the plaintiff sent to it certain he repeatedly wrote her requesting her to come in and receive her money, and yet, when she finally did come in a year later, in place of giving her the money, he sought to set off counter claims for matters which were in existence in the lifetime of the deceased and long before the contract on which this

suit was brought was prepared by him. It clearly appears from Miller's own testimony that he was not representing the interests of the plaintiff but that he was directly representing the interests opposed to her claim; and under every principle of law and legal ethics he was prohibited from representing plaintiff in the matter. Attorneys at law cannot accept employment from adverse litigants at the same time and in the same controversy. Gary v. Beadles, Gen. No. 21293, Appellate Court, First Dist.; Strong v. International Investment Union, 183 Ill. 97; People v. Gerold, 265 Ill. 488.

It follows, therefore, that the receipt which Miller testifies he gave to the defendant in full of plaintiff's claim, is of no binding effect on the plaintiff; and as there is no evidence that Miller ever turned over to plaintiff the balance which he claims to have collected, plaintiff is entitled to recover.

The judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

was prepared by him. It clearly appears from Miller's own testimony that he was not representing the interests of the plaintiff but that he was directly representing the interests exposed to her claim; and under every principle of law and legal ethics he was prohibited from representing plaintiff in the matter. A lawyer at law cannot accept employment from adverse litigation of the same time and in the same controversy. Gray v. Bessie, Gen. No. 21253, Appellate Court, First Dist.; Gray v. International Investment Union, 183 Ill. 27; Booia v. David, 265 Ill. 489.

It follows, therefore, that the receipt which Miller testified he gave to the defendant in full of plaintiff's claim, is of no binding effect on the plaintiff; and as there is no evidence that Miller ever turned over to plaintiff the balance which he claims to have collected, plaintiff is entitled to recovery. The judgment of the Appellate Court of Chicago is affirmed.

APPROVED.

147 - 22095

CHARLES B. TRAVIS,

Defendant in Error.

vs.

GEORGE F. LEIBRANDT,

Plaintiff in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

2001A 16

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

Charles B. Travis brought suit in the Municipal Court against George F. Leibrandt and the Lincoln State Bank of Chicago, a corporation, to recover \$111. The case was tried before the court without a jury, and after evidence was introduced plaintiff dismissed as to the bank, and there was a finding and judgment against Leibrandt for the amount of plaintiff's claim, to reverse which he prosecutes this writ of error.

The record discloses that plaintiff was in the commission business, and that the defendant Leibrandt was president of the bank; that on or about July 1, 1915, plaintiff and Leibrandt had a conversation at the bank, at which time plaintiff stated that he had a prospective customer that might be interested in buying some of the bank stock, and inquired of Leibrandt what plaintiff would receive for procuring a purchaser. Leibrandt replied that if plaintiff would procure a purchaser for ten shares of stock for \$1,000, plaintiff would receive

CHARLES E. TRAVIS,

Defendant in error,

vs.

GEORGE F. WEINBERG,

Plaintiff in error.

Plaintiff in error.

Plaintiff in error.

2001 A. 16

MR. PRESIDING JUDGE CROCKFORD delivered the

opinion of the court.

Charles E. Travis brought suit in the Circuit Court against George F. Weinberg and the Illinois State Bank of Chicago, a corporation, to recover \$111,100. The case was tried before the court without a jury, and after evidence was introduced plaintiff dismissed as to the bank, and there was a finding and judgment against defendant for the amount of plaintiff's claim, to reverse which he prosecuted this writ of error.

The record discloses that plaintiff was in the commission business, and that the defendant Weinberg was president of the bank; that on or about July 1, 1911, plaintiff and Weinberg had a conversation at the bank, at which time plaintiff stated that he had a prospective customer that might be interested in buying some of the bank stock, and inquired of Weinberg what plaintiff would receive for procuring a purchaser. Weinberg replied that if plaintiff would procure a purchaser for ten shares of stock for \$1,000, plaintiff would receive

one share of stock or \$111 the book value of the same. Plaintiff procured a purchaser who paid \$1,000 for ten shares of stock, and demanded his commissions, which demand was refused.

Defendant contends that the evidence shows that "Leibrandt was not acting for himself, and that there was no agreement that Leibrandt personally was to pay any commission. The bank could only act in the sale of its stock through its duly authorized officers of which Leibrandt, as president, was one. The facts clearly show that if there was any liability it was against the bank and not against Leibrandt."

There is no evidence in the record that would in any way tend to show whether the ten shares of stock sold was the property of the defendant or the property of the bank; neither is there any evidence that would indicate that the defendant was representing the bank. If the defendant would relieve himself from personal liability, the onus was upon him to show that the stock belonged to the bank and that he had authority to bind the bank. This he has failed to do. In the case of Wheeler v. Reed, et al., 36 Ill. 81, the court said p. 91: "If defendant was acting as an agent in making the warranty, the onus is upon him to show he had authority to bind his principal. It is not for the plaintiff to show he had not authority, but the agent must prove it." See also Willoughby v. Brown, 190 Ill. App. 51; Nudelman v. Haffenberg, 199 Ill. App. 463.

The judgment of the Municipal Court of Chicago is correct and it is affirmed.

AFFIRMED.

one share of stock or will the book value of the same.
Plaintiff procured a statement who said \$1,000 for the
share of stock, and demanded his compensation, which
demand was refused.

Defendant contends that the said one share that
"Leibbrandt was not acting for himself, and that there
was no agreement that Leibbrandt personally was to pay
any compensation. The bank could only act in the name of
its stock through its duly authorized officers of which
Leibbrandt, as president, was one. The record clearly
shows that if there was any liability it was against the
bank and not against Leibbrandt."

There is no evidence in the record that would
in any way tend to show whether the ten shares of stock
sold was the property of the defendant or the property
of the bank; neither is there any evidence that would
indicate that the defendant was representing the bank.
If the defendant would relieve himself from personal
liability, the onus was upon him to show that the stock
belonged to the bank and that he had authority to bind
the bank. This he has failed to do. In the case of
Shanley v. Lead, et al., 50 Ill. 51, the court held p.
91: "If defendant was acting as an agent in selling the
warranty, the onus is upon him to show he had authority
to bind his principal. It is not for the plaintiff to
show he had not authority, but the agent must prove it."
See also Wilcox v. Brown, 100 Ill. 100; 51; Wideman
v. Halberstam, 109 Ill. App. 403.

The judgment of the Municipal Court at Chicago
is correct and it is affirmed.

620 - 22018.

ALBERT PIREK,
Appellee,

vs.

FRANK E. SCOTT,
Appellant.

APPEAL FROM

COUNTY COURT,

COOK COUNTY.

200 I.A. 44

MR. JUSTICE GOODWIN delivered the opinion of the court.

The appellee, who will be referred to as plaintiff, recovered a judgment against appellant, who will be referred to as defendant, for \$600. From this judgment the defendant appealed. The substance of plaintiff's claim, as disclosed by the pleadings and the evidence, was that he had loaned the defendant personally \$1,000, and had received from him five notes for \$200 each, which he supposed were defendant's personal notes, but which turned out to be notes of a company of which defendant was president and plaintiff an employee. The evidence offered on behalf of both parties is to the effect that defendant originally borrowed \$1,000 from the plaintiff, and gave his personal note for it, and that subsequently the note was paid. Plaintiff's testimony, however, tended to show that after the payment of the loan, defendant desired to re-borrow the \$1,000 which plaintiff had put in his safe deposit box, and plaintiff re-loaned it to him and at the same time surrendered the original note and received in its place five notes of \$200 each, which he saw the defendant sign and which he believed to be the personal notes of defendant. The testimony for plaintiff further tended to show that he could neither read nor write the English language, and made the loan as a personal loan to the defendant, and that no suggestion was made to him that he was making a loan to anyone else. The testimony on behalf of the defendant was to the effect that the loan was

2001.A.1008

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made as a loan to the company, and not to defendant. The question of whether it was made to the one or to the other was properly a question of fact for the jury, and upon a careful examination of the record we are unable to say that the jury's conclusion was contrary to the manifest weight of the evidence.

It is claimed that a letter written by one of the defendant's witnesses was improperly received in evidence as it was not written by defendant or his agent, and was not binding upon him. The facts in regard to the letter were brought out on cross-examination, and it was properly admissible as evidence tending to contradict the witness.

For the defendant it is finally contended that the verdict was the result of passion and prejudice induced by the improper conduct of plaintiff's counsel. Counsel did refer to plaintiff as a poor workman; upon objection the word "poor" was withdrawn, and counsel admitted that plaintiff was not poor. Counsel further referred to one of defendant's witnesses as a liar; the court ruled that the remark was highly improper, and upon defendant's motion struck it from the record. No further objection was made to the form or substance of any other part of the argument, and we are of the opinion that the parts to which objections were made and sustained did not constitute reversible error.

The judgment of the County Court is affirmed.

AFFIRMED.

There is a large number of people who are not
 acquainted with the fact that the only way to
 get a good education is by going to school.
 and by studying hard. It is not enough to
 go to school and sit there all day long.
 The student must be interested in his work
 and must try to learn as much as he can.

It is also true that a student must be
 interested in his work. If he is not
 interested, he will not learn. It is not
 enough to go to school and sit there all day
 long. The student must be interested in his
 work and must try to learn as much as he can.

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 long. The student must be interested in his
 work and must try to learn as much as he can.

Filed May 31/17

488 - 21886

DAVID T. ALEXANDER,

Appellee,

vs.

MUNSON T. CASE,

Appellant.

APPEAL FROM

COUNTY COURT,

COOK COUNTY.

206 I.A. 69

MR. JUSTICE TAYLOR delivered the opinion of the court.

The appeal in this case is from a judgment in the sum of \$250.00, in favor of Alexander and against Case, in a suit in assumpsit, for breach of contract in regard to certain fees for legal services.

The declaration, which was filed February 2, 1914, alleged, among other things, that Case, the defendant, an attorney, was engaged by Alexander, the plaintiff, to assist the latter in the rendition of legal services in a certain condemnation case; that it was agreed that whatever fees or compensation was received by the defendant, Case, for said legal services, were to be divided equally between plaintiff and defendant; that on September 22, 1913, Case collected for legal services in said cause, from said Harris and Esther Stern the sum of \$750.00, and that said Case has refused and neglected to pay the said Alexander half of said sum.

The defendant, Case, pleaded non-assumpsit and, specially, that he was employed by the plaintiff, as the agent for Harris and Esther Stern, to render legal services in the condemnation proceedings, and that his, Case's legal

488 - 21888

DAVID T. ALEXANDER,

Appellee,

APPELLATE COURT,

COCK COUNTY,

COCK COUNTY.

vs.

MURSON T. CASE,

Appellant.

2001.A.03

MR. JUSTICE TAYLOR delivered the opinion of the

court.

The appeal in this case is from a judgment in

the sum of \$250.00, in favor of Alexander and against
Case, in a suit in assumpsit, for breach of contract
in regard to certain fees for legal services.

The declaration, which was filed February 2,
1914, alleged, among other things, that Case, the defend-
ant, an attorney, was engaged by Alexander, the plaintiff,
to assist the latter in the rendition of legal services
in a certain condemnation case; that it was agreed that
whatever fees or compensation was received by the defend-
ant, Case, for said legal services, were to be divided
equally between plaintiff and defendant; that on September
22, 1913, Case collected for legal services in said case,
from said Harris and Nathan Stern the sum of \$750.00,
and that said Case has refused and neglected to pay the
said Alexander half of said sum.

The defendant, Case, pleaded non-assumpsit and,
specifically, that he was employed by the plaintiff, as the
agent for Harris and Nathan Stern, to render legal services
in the condemnation proceedings, and that said Case's legal

services were to be paid for by the Sterns; that he, the defendant Case, rendered certain legal services to the Sterns and upon their failure to pay him therefor he brought suit against them, in which suit the plaintiff, Alexander, filed and entered his written and general appearance as the attorney of record for the Sterns; that he, Case, in the said cause recovered judgment against the Sterns and collected thereon the sum of \$750.00.

The cause was tried before a jury, which brought in a verdict of \$250.00, for Alexander, upon which on June 26, 1915, judgment was entered.

Alexander and Case, both attorneys at law, officed together and undertook to do some legal practice, more or less in common, in the Summer of the year 1912. The general understanding was that where work was turned over by Alexander to Case the fees that might be received therefor would be divided between them. They took part jointly in from six to eight cases, in all of which, with the exception of one known as the Zeman case, the fees were practically equally divided between them. In the latter part of November or the early part of December, 1912, Alexander called Case's attention to a condemnation proceeding which had been pending in court for some time, and which was concerning property belonging to Alexander's father and mother-in-law, Harris and Esther Stern. Case was then engaged by Alexander to go to work in that case. Alexander testified that he told Case that whatever they received for their legal services it was distinctly understood they would divide equally between them. From that time on Case took charge of the condemnation proceedings, and subsequently they were terminated,

438 - 21888

DAVID T. ALEXANDER,

Appellee,

APPEAL FROM

COUNTY COURT,

COOK COUNTY.

vs.

MURKIN T. CASE,

Appellant.

2001 A. 69

MR. JUSTICE TAYLOR delivered the opinion of the

court.

The appeal in this case is from a judgment in

the sum of \$250.00, in favor of Alexander and against

Case, in a suit in assumpsit, for breach of contract

in regard to certain fees for legal services.

The declaration, which was filed February 8,

1914, alleged, among other things, that Case, the defend-

ant, an attorney, was engaged by Alexander, the plaintiff,

to assist the latter in the rendition of legal services

in a certain condemnation case; that it was agreed that

whatever fees or compensation was received by the defend-

ant, Case, for said legal services, were to be divided

equally between plaintiff and defendant; that on September

22, 1913, Case collected for legal services in said case,

from said Harris and Arthur Stern the sum of \$750.00,

and that said Case has refused and neglected to pay the

said Alexander half of said sum.

The defendant, Case, pleaded non-assumpsit and,

especially, that he was engaged by the plaintiff, as the

agent for Harris and Arthur Stern, to render legal services

in the condemnation proceedings, and that his Case's legal

services were to be paid for by the Sterns; that he, the defendant Case, rendered certain legal services to the Sterns and upon their failure to pay him therefor he brought suit against them, in which suit the plaintiff, Alexander, filed and entered his written and general appearance as the attorney of record for the Sterns; that he, Case, in the said cause recovered judgment against the Sterns and collected thereon the sum of \$750.00.

The cause was tried before a jury, which brought in a verdict of \$250.00, for Alexander, upon which on June 26, 1915, judgment was entered.

Alexander and Case, both attorneys at law, officed together and undertook to do some legal practice, more or less in common, in the Summer of the year 1912. The general understanding was that where work was turned over by Alexander to Case the fees that might be received therefor would be divided between them. They took part jointly in from six to eight cases, in all of which, with the exception of one known as the Zeman case, the fees were practically equally divided between them. In the latter part of November or the early part of December, 1912, Alexander called Case's attention to a condemnation proceeding which had been pending in court for some time, and which was concerning property belonging to Alexander's father and mother-in-law, Harris and Esther Stern. Case was then engaged by Alexander to go to work in that case. Alexander testified that he told Case that whatever they received for their legal services it was distinctly understood they would divide equally between them. From that time on Case took charge of the condemnation proceedings, and subsequently they were terminated,

services were to be paid for by the Sterns; that he, the defendant Case, rendered certain legal services to the Sterns and upon their failure to pay him therefor he brought suit against them, in which suit the plaintiff, Alexander, filed and entered his written and general appearance as the attorney of record for the Sterns; that he, Case, in the said cause recovered judgment against the Sterns and collected thereon the sum of \$750.00.

The cause was tried before a jury, which brought in a verdict of \$250.00 for Alexander, upon which on June 26, 1912, judgment was entered.

Alexander and Case, both attorneys at law, offices together and undertook to do some legal practice, more or less in common, in the summer of the year 1912. The general understanding was that where work was turned over by Alexander to Case the fees that might be received therefor would be divided between them. They took part jointly in from six to eight cases, in all of which, with the exception of one known as the Roman case, the fees were practically equally divided between them. In the latter part of November or the early part of December, 1912, Alexander called Case's attention to a condemnation proceeding which had been pending in court for some time, and which was concerning property belonging to Alexander's father and mother-in-law, Harris and Esther Stern. Case was then engaged by Alexander to go to work in that case. Alexander testified that he told Case that whatever they received for their legal services it was distinctly understood they would divide equally between them. From that time on Case took charge of the condemnation proceedings, and subsequently they were terminated,

the Sterns receiving \$18,000 for their interest in the property. There was considerable controversy thereafter between Alexander and Case as to the fees which they should charge for their services. On June 6, 1913, Case having received no fees for services rendered in the condemnation proceedings, brought suit in the Superior Court of Cook County against Esther Stern, Harris Stern and Alexander. Just prior to the institution of the foregoing suit, Case and Alexander had discussed the subject of fees and how the fees might be obtained. Alexander testified as follows:

"Several days after that, when the money wasn't forthcoming, Mr. Case told me - he says, 'I am going to bring suit against your people today.' I said, 'All right, Case. I can't get the money - go to it.' He was still officing with me when he brought the suit; shortly after that he moved. He went upstairs with Mr. Quin O'Brien. I met him several days after that; he wanted to know why it was the folks hadn't had service on them. I said, 'I will tell you, Case, when they are served they are going to bring the summons to me. I know that. They will want me to enter my appearance. I will enter my appearance in the lawsuit for the fees, and then we will have a better chance for settling. But there isn't a question but they will come to me after you have served them.' Probably three of four weeks passed before service was had, and when service was had they brought the paper to me, and I entered my appearance for Harris and Esther Stern."

The foregoing testimony of Alexander is denied by the defendant, Case. It is claimed by the latter that the understanding which was made in March, 1913, was that he, Case, should receive \$50.00 per day for all the time he actually devoted to the condemnation case. Case offered to introduce in evidence an entry in his diary to that effect, to which objection was offered, however, and sustained. After the \$18,000 was paid over to the Sterns, quite a number

the terms receiving \$15,000 for a six interest in the property. There was considerable controversy thereafter between Alexander and Case as to the fees which they should charge for their services. On June 6, 1913, Case having received no fees for services rendered in the condemnation proceedings, brought suit in the Superior Court of Cook County against Walter Stern, Natalie Stern and Alexander. Just prior to the institution of the foregoing suit, Case and Alexander had discussed the subject of fees and how the fees might be obtained. Alexander testified as follows:

"Several days after that, when the money wasn't forthcoming, Mr. Case told me - he says, 'I am going to bring suit against your people today.' I said, 'All right, Case. I can't get the money - go to it.' He was still officious with me when he brought the suit; shortly after that he moved. He went west with Mr. John G. Sullivan. I met him several days after that; he wanted to know why it was the folks hadn't had service on them. I said, 'I will tell you, Case, when they are served they are going to bring the summons to me. I know that. They will want me to enter my appearance. I will enter my appearance in the lawsuit for the fees, and the fees we will have a better chance for getting. But there isn't a question but they will come to me after you have served them.' Probably three or four weeks passed before service was had, and then service was had they brought the paper to me, and I entered my appearance for Walter and Natalie Stern."

The foregoing testimony of Alexander is denied by the defendant, Case. It is claimed by the latter that the understanding which was made in March, 1913, was that he, Case, should receive \$50.00 per day for all the time he actually devoted to the condemnation case. Case offered to introduce in evidence an entry in his diary to that effect, to which objection was offered, however, and sustained. After the \$5,000 was paid over to the Sterns, Case a number

of conversations took place between Alexander and Case about the fees. Case claims that about June 4, 1913, having a large payment to make, he offered to settle for \$250.00, if the money was paid at once. Accordingly, Alexander gave him a check for \$250.00, which was subsequently deposited and returned no funds. Case claims that after the suit was brought against the Sterns and Alexander, in which judgment for \$750.00 was subsequently obtained, he did not have any conversation with Alexander to the effect that he would divide with him whatever he would procure by judgment. There is no doubt but that \$750.00 was no more than reasonable compensation for the services rendered in the condemnation proceedings.

After the suit was brought against the Sterns, judgment was obtained for \$750.00 and costs, and that amount was paid to Case. In that suit the only appearance for the defendants, Sterns, was that of Alexander. It will be seen, therefore, that Alexander is now suing Case for part of the fees, for which Case obtained judgment, in a suit in which Alexander represented the Sterns; and in which he undertook to defend them against a claim, one-half of which he claims he owned.

If Alexander was jointly interested in the fees for which Case obtained judgment, and there was an agreement,

of conversations took place between Alexander and Gase about the fees. Gase claimed that about March 4, 1917, having a large payment to make, he offered to settle for \$250.00, if the money was paid at once. Accordingly, Alexander gave him a check for \$250.00, which was subsequently deposited and returned no funds. Gase claims that after the suit was brought against the Sterns and Alexander, in which judgment for \$750.00 was subsequently obtained, he did not have any conversation with Alexander to the effect that he would divide with him whatever he would procure by judgment. There is no doubt but that \$750.00 was no more than Alexander's compensation for the services rendered in the condemnation proceedings.

After the suit was brought against the Sterns, judgment was obtained for \$750.00 and costs, and that amount was paid to Gase. In that suit the only appearance for the defendants, Sterns, was that of Alexander. It will be seen, therefore, that Alexander is now suing Gase for part of the fees, for which Gase obtained judgment, in a suit in which Alexander represented the Sterns; and in which he undertook to defend them against a claim, one-half of which he claims he owned.

It Alexander was jointly interested in the fees for which Gase obtained judgment, and there was an agreement,

as Alexander claims, to split the fees, then it follows that those fees being merged in the judgment, Alexander is now really claiming a portion of a judgment which he was retained to resist.

The only obligations outstanding at any time to pay fees, were from the Sterns, either to Case or Alexander, or both of them. Alexander will not be allowed to say that when Case sued the Sterns for fees, he, himself, representing the Sterns, recognized that suit as in part for fees for himself.

If Case, in obtaining judgment for \$750.00, recovered more than he was entitled to, it was because Alexander fraudulently and unprofessionally represented the Sterns; and, therefore, to allow Alexander, now, in this suit to recover from Case, would be using the courts and the law to allow Alexander to get judgment by reason of his own fraud.

If both attorneys conspired to obtain a judgment, part of which conspiracy was that Alexander should represent the Sterns, then it is obvious that the law will not help Alexander to obtain the advantage contemplated by the conspiracy. Elkins v. McCaskill, 174 Ill. App. 563; Strong v. Int. Inv. Union, 183 Ill. 101; People v. Gerrold, 265 Ill.

as Alexander claims, to split the fees, then it follows that these fees being merged in the judgment, Alexander is now really claiming a portion of a judgment which he was retained to realize.

The only obligations outstanding at any time

to pay fees, were from the terms, signed to Cass or Alexander, or both of them. Alexander will not be allowed to say that when Cass sued the terms for fees, he, himself, representing the terms, recognized that such as in part for fees for himself.

If Cass, in obtaining judgment for \$750.00,

recovered more than he was entitled to, it is because Alexander fraudulently and unconscionably represented the terms; and, therefore, to allow Alexander, now, in this suit to recover from Cass, would be using the courts and the law to allow Alexander to get judgment by reason of his own fraud.

If both Alexander conspired to obtain a judgment, part of which conspiracy was that Alexander should represent the terms, then it is obvious that the law will not help Alexander to obtain the advantage conferred by the conspiracy. Wing v. Woodhill, 175 Ill. App. 633; Stinson v. Stinson, 125 Ill. App. 121; People v. Carville, 233 Ill. App. 121.

448; Valentine v. Stewart, 15 Calif. 387; Steger v. Hume,
97 Texas, 324; Spinks v. Davis, 32 Miss. 152; Hatch v. Fogerty,
40 Howard Pr. 492.

The moment Alexander became attorney for the defend-
ants in the suit brought by Case for fees, that moment he
must be considered as having abandoned all right to any
recovery against Case for fees for the legal services render-
ed the Sterns.

REVERSED AND JUDGMENT FOR
APPELLANT FOR COSTS.

448; Valentine v. Stewart, 13 Calif. 387; Wright v. Jones,
97 Texas, 324; Smith v. Davis, 38 Miss. 186; Wright v. Wright,
40 Howard 27. 492.

The moment Alexander became attorney for the Sterns
case in the suit brought by Case for fees, that moment he
must be considered as having abandoned all right to any
recovery against Case for fees for the legal services rendered
ed the Sterns.

RECEIVED BY THE
ATTORNEY GENERAL

521 - 21918

WM. T. KELLOGG,

Appellant,

vs.

JOHN A. BICKFORD, Impleaded
with, etc.,

Appellee.

APPEAL FROM

COUNTY COURT,

COOK COUNTY.

206 I.A. 76

MR. JUSTICE TAYLOR delivered the opinion of the court.

Appellant brought suit in the County Court on a promissory note for \$1,000, against the appellee, the maker of the note. The cause was tried before a jury and a verdict rendered for the defendant, upon which the trial court entered judgment against the plaintiff for the costs of the suit.

Appellant complains of certain instructions, and that improper evidence was admitted, and that the judgment is contrary to the law and against the weight of the evidence. Upon the trial of the case the plaintiff offered in evidence the note and rested. The note in question was dated November 23, 1914, and payable four months after date, to the order of Lucius Winchester, and was signed by John A. Bickford, (appellee) and endorsed "Lucius Winchester" and "B. H. Loveless," and was given by appellant to Loveless as agent for Winchester, as part payment for an interest in a certain written contract. At the same time, also, appellant gave Loveless a check for \$666.00, the note and check being appellant's payment in full for his interest in the contract. The agreement

251 - 21917

W. T. KENLON

Appellant

vs.

JOHN A. BICKFORD, Defendant
et al.

Appellee

W. T. KENLON

Appellant

vs.

206 I.A. 78

MR. JUSTICE TAYLOR delivered the opinion of

the court.

Appellant brought suit in the County Court on a promissory note for \$1,000, against the appellee, the maker of the note. The cause was tried before a jury and a verdict rendered for the defendant, upon which the trial court entered judgment against the plaintiff for the sum of the debt.

Appellant complains of certain instructions,

and that improper evidence was admitted, and that the judgment is contrary to the law and against the weight of the evidence. Upon the trial of the case the plaintiff offered in evidence the note and testified that the note was dated November 27, 1914, and payable four months after date, to the order of John A. Bickford, and was signed by John A. Bickford, (appellee) and assigned to appellant as agent for Bickford, and was given "John A. Bickford" and "J. H. Lovelace," and was given by appellant to Lovelace as agent for Bickford, as part payment for an interest in a certain written contract. At the same time, also, appellant gave Lovelace a check for \$200.00, the note and check being appellant's payment

made with Winchester, or his agent Loveless, was that F. A. Hale, J. A. Bickford, (appellee) and B. H. Loveless should pay in cash or notes, an aggregate of \$5,000, and receive therefor what was called a \$5,000 agent's contract, issued by the Domestic Utilities Manufacturing Company of Los Angeles, California.

The evidence of the appellee is to the effect that the agent's contract was never delivered and that there was a failure of consideration. Subsequently, on January 24, 1913, the \$1,000 note in question, signed by appellant, together with another note of \$1,000, signed by F. A. Hale, were put up as collateral security by B. H. Loveless and H. D. Kellogg, (brother of appellant) with the Jefferson Park National Bank, to secure their principal note in the sum of \$925.00, payable to the Jefferson Park National Bank. On March 22, 1913, there was paid to the Jefferson Park National Bank, two checks, one for \$700.00 and one for \$200.00, for which appellant received the \$1,000 note in question, and also the Hale \$1,000 note. There is considerable evidence to the effect that H. D. Kellogg, a brother of the appellant, a few days prior to March 22, 1913, made some inquiries concerning the \$1,000 note in question, and was informed that the note was without consideration and would not be paid when due; and also to the effect that H. D. Kellogg took part in the transaction as an agent for his brother. Appellant admits that he went to the Jefferson Park National Bank, on March 22, 1913, through an appointment with his brother, but claims that the \$900.00 which was paid to the bank on that occasion, for the two \$1,000

made with Winchester, or his agent hereafter, and that J. A. Hale, J. A. Kieffer, (appellee) and B. H. Lavelle a valid pay in cash or notes, at aggregate of \$5,000, and receive therefor what was called a \$5,000 aggregate contract, issued by the Domestic Utilities Manufacturing Company of Los Angeles, California.

The evidence of the appellee is to the effect that the agent's contract was never delivered and that there was a failure of consideration. Subsequently, on January 14, 1913, the \$1,000 note in question, signed by appellee, together with another note of \$1,000, signed by J. A. Hale, were put up as collateral security by B. H. Lavelle and H. B. Kelllogg, (brother of appellee) with the teller of Park National Bank, to secure their principal note in the sum of \$250.00, payable to the teller of Park National Bank. On March 22, 1913, there was paid to the teller of Park National Bank, two checks, one for \$700.00 and one for \$800.00, for which appellee received the \$1,000 note in question, and also the Hale \$1,000 note. There is considerable evidence to the effect that H. B. Kelllogg, a brother of the appellee, a few days prior to March 22, 1913, made some inquiries concerning the \$1,000 note in question, and was informed that the note was without consideration and would not be paid when due; and also to the effect that H. B. Kelllogg took part in the transaction as an agent for his brother. Appellee admits that he went to the teller of Park National Bank, on March 22, 1913, through an agent, went with the brother, but claims that the \$800.00 which was paid to the bank on that occasion, for the two \$1,000

notes, one of which was the note in question, and the other a note of Hale for \$1,000, was all his own money and paid only for himself.

Evidently the verdict of the jury means that appellant bought and received the note with notice of a failure of consideration. It is not claimed that the plaintiff is not the legal owner and holder of the note in question, nor is there any claim that H. D. Kellogg, (brother of appellant) had any notice of any infirmity in the note prior to January 24, 1913, at the time when the note was put up as collateral security with the Jefferson Park National Bank. The critical question in the case is whether instruction number five, which was refused, and instructions numbers eight and ten, which were given, constitute material error.

In Kellogg v. Hale, 190 Ill. App. 13, a case growing out of the Hale note which was given contemporaneously with the note of appellant, in the same transaction, the late Mr. Justice Baker said:

"There is in the record no evidence of any fraud or circumvention in obtaining defendant to make the note. He knew that he was making a promissory note and only claims that false representations were made to him as to the consideration of the note, and that in fact it was given without consideration. Fraud must relate to the execution of the note and not to the consideration on which it is based. The fraud must consist of some trick or device that induces the giving of one kind of an instrument under the belief of the maker that he is giving one of a different kind. Gray v. Goode, 72 Ill. App. 564. The burden was on the defendants to show that the note was without consideration and that plaintiff was not an innocent holder thereof for value and before maturity."

and said only for himself.

Other a case of wife for 1,000, was in the day

notes, one of which was the note in question, and the

Exhibit A is a copy of the letter from the
attorney general dated January 24, 1937, at the time when the
note was put up as collateral security with the Jefferson
Park National Bank. The critical question in the case is
whether instructions number five, which was refused, and
instructions numbers eight and ten, which were given, con-
stitute material error.

in Kellogg v. Johnson, 1901 Ill. App. 13, 2 case growing out of the late host which was given confidentially with the note of appeal as, in the case of Johnson, the late Mr. Justice Baker said:

[illegible]

So in the instant case, there is no evidence in the record of any fraud or circumvention, which caused appellee to execute the note. It is true that in the first plea of appellee, it is charged that the execution of the note was obtained "by use of fraud and circumvention," but the plea then goes on further and states, fully and in detail, a charge of fraud as to the consideration for the note, so that the issue made up by that plea, is, in substance, and obviously, that the note was given without consideration, and not that it was obtained by "fraud and circumvention". Appellant insists, however, that under the circumstances he was entitled to instruction number five, which is as follows:

"The court instructs the jury that there is no evidence in this case of any fraud or circumvention in obtaining the defendant, John A. Bickford, to make or execute the note in question."

Bearing in mind part of the language of the first special plea, that is, the use of the words "fraud and circumvention," it may be that there would have been no impropriety in giving the instruction number five, but considering the actual substance of the first special plea, which was a charge of failure of consideration, and the language of instruction number four, which was given, that the note in evidence "makes out a prima facie case for and on behalf of the plaintiff; that the plaintiff is presumed to be a bona fide holder of said instrument for a valuable consideration and before maturity thereof," we are of the opinion that the refusal of instruction number five was not a material error. We have examined instructions numbers eight and ten, and do not find that they were erroneously given.

So in the instant case, there is no evidence in the record of any fraud or circumvention, which would entitle to execution the note. It is true that in the first plea of appellee, it is charged that the execution of the note was obtained "by use of fraud and circumvention," but the plea then goes on further and states, fully and in detail, a charge of fraud as to the consideration for the note, so that the issue made up by that plea, is, in substance, and obviously, that the note was given without consideration, and not that it was obtained by "fraud and circumvention". Appellant insists, however, that under the circumstances he was entitled to instruction number five, which is as follows:

"The court instructs the jury that there is no evidence in this case of any fraud or circumvention in obtaining the defendant, John A. Rickford, to make or execute the note in question."

Bearing in mind part of the language of the first special plea, that is, the use of the words "fraud and circumvention," it may be that there would have been no impropriety in giving the instruction number five, but considering the actual substance of the first special plea, which was a charge of failure of consideration, and the language of instruction number four, which was given, that the note is voidable "under out a private trade case for and on behalf of the plaintiff; that the plaintiff is presumed to be a bona fide holder of said instrument for a valuable consideration and before maturity thereof," we are of the opinion that the refusal of instruction number five was not a material error. We have examined instruction numbers four and five, and do not find that they were erroneously given.

It is contended by the appellant that the trial judge erred in admitting testimony of what certain witnesses heard appellant testify to in a trial in the Municipal Court. That evidence was entirely competent. Wheat v. Summers, 13 Ill. App. 448. Evidence of the utterances of a party to a law suit, whether those utterances were in the course of another law suit or not, is competent if material to the issue. As to the contention that the trial judge erred in rejecting appellant's offer of what purported to be a transcript of the testimony of appellant in another case, we are of the opinion that in the form in which it was presented it was obviously incompetent.

There being no material error in the record, the judgment is affirmed.

AFFIRMED.

is contained by the appellant that the

trial judge erred in admitting testimony of what occurred in

attendance heard a silent testimony to the trial in the

Municipal Court. That evidence was entirely competent.

People v. Lewis, 13 Ill. App. 448. Evidence of the

attendance of a party to a law suit, whether there were

others was in the course of another law suit or not, is

competent if material to the issue. As to the question

that the trial judge erred in rejecting evidence of the

of what happened to be a transcript of the testimony

of appellant in another case, we are of the opinion that in

the form in which it was presented it was obviously inad-

missible.

There being no material error in the record, the

judgment is affirmed.

APPEAL.

603 - 22001

HERBERT A. PARKYN,

Appellee,

vs.

GEORGE R. TURLEY,

Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

206 I.A. 78

MR. JUSTICE TAYLOR delivered the opinion
of the court.

This is an appeal by George R. Turley,
(appellant) from a judgment of \$5,395.00, entered in
the Superior Court of Cook County, on July 6, 1915,
in an action on the case, for the conversion of cer-
tain certificates of stock.

Parkyn, (appellee) on February 13, 1908,
borrowed \$3,000 from D. M. Bell & Company, who were in
the brokerage business, and gave his note therefor in
the sum of \$3,000, payable ninety days after date, to
the order of D. M. Bell & Company, with interest at
the rate of seven per cent per annum. To secure the note,
he caused to be deposited as collateral thereto, 2500
shares of certain mining stock. In the note itself it
is recited that Parkyn deposited the stock as collateral
security and that in case the legal holder should at any
time be of the opinion that said stock "is, or may be of
less value than above stated, (it being stated in the
note that the market value of the stock was then \$7,500),
or that the whole or any part of said property has de-
clined or may decline in value, or in case the legal
holder hereof shall feel insecure," that the legal holder

HARBERT A. PARKYN,

Appellee,

vs.

GEORGE R. TURLEY,

Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

2061A78

MR. JUSTICE TAYLOR delivered the opinion

of the court.

This is an appeal by George R. Turley, (appellant) from a judgment of \$2,703.00, entered in the Superior Court of Cook County, on July 6, 1916, in an action on the case, for the conversion of certain certificates of stock.

Parkyn, (appellee) on February 18, 1908, borrowed \$3,000 from D. M. Bell & Company, who were in the brokerage business, and gave his note therefor in the sum of \$3,000, payable ninety days after date, to the order of D. M. Bell & Company, with interest at the rate of seven per cent per annum. To secure the note, he caused to be deposited as collateral thereon, 2800 shares of certain mining stock. In the note itself it is recited that Parkyn deposited the stock as collateral security and that in case the legal holder should at any time be of the opinion that said stock "is, or may be of less value than above stated," (it being stated in the note that the market value of the stock was then \$7,800), or that the whole or any part of said property has declined or may decline in value, or in case the legal holder thereof shall feel insecure, that the legal holder

may then, in his discretion, call for additional security, and if it is not furnished, may at his option, declare the note due and payable. It was also provided that the legal holder had authority "from time to time to sell, or cause to be sold, all or any part of said pledged property, and any property substituted therefor" on or before the maturity of the note, "if the property or substitutes, or additions, shall depreciate in value, or if said legal holder hereof shall feel insecure, at the discretion of said legal holder," at public or private sale. The transaction was conducted by Parkyn with Turley, at the offices of D. M. Bell & Company, on February 13, 1908.

Shortly after February 13, 1908, the collateral, being 2500 shares of mining stock, and which it was recited in the note of February 13, 1908, was worth \$7,500, was sold. The evidence is conflicting as to exactly what it was sold for, although there is evidence which justifies concluding that it was sold for not less than \$7,000. Turley testified that about the time of the sale the mining stock depreciated to the extent of \$4,500, and that it was sold as a matter of protection. The testimony, however, of Parkyn, Carnahan and Bell, is very convincing that it sold for \$7,000 or over.

On May 13, 1908, at the expiration of the ninety days, Parkyn went to the office of D. M. Bell & Company and asked Turley to be allowed to renew the \$3,000 note. Parkyn testified that he asked Turley if he should renew or pay the note, and that he told him, Turley, that he was ready to do either. Turley testified that Parkyn asked if the loan could be renewed, and that he told him it

may then, in his discretion, call for additional security, and if it is not furnished, may at his option, declare the note due and payable. It was also provided that the legal holder had authority "from time to time to sell, or cause to be sold, all or any part of said pledged property, and any property substituted therefor" on or before the maturity of the note, "if the property, or substitutes, or additions, shall be inadequate in value, or if said legal holder herself shall feel insecure, at the discretion of said legal holder," at public or private sale. The transaction was conducted by Barkyn with Turley, at the office of D. M. Bell & Company, on February 13, 1908.

Shortly after February 13, 1908, the collateral, being 2500 shares of mining stock, and which it was received in the note of February 13, 1908, was worth \$7,500, was sold. The evidence is conflicting as to exactly what it was sold for, although there is evidence which justifies concluding that it was sold for not less than \$7,000. Turley testified that about the time of the sale the mining stock depreciated to the extent of \$4,500, and that it was sold as a matter of protection. The testimony, however, of Barkyn, Garman and Bell, is very convincing that it sold for \$7,000 or over.

On May 13, 1908, at the expiration of the ninety days, Barkyn went to the office of D. M. Bell & Company and asked Turley to be allowed to renew the \$5,000 note. Barkyn testified that he asked Turley if he should renew or pay the note, and that he told him, Turley, that he was ready to do either. Turley testified that Barkyn asked if the loan could be renewed, and that he told him it

could be if he so wished; that Parkyn said he would appreciate it very much if it could be renewed. Accordingly, the old note of February 13, 1908, for \$3,000, was taken up and a new one dated May 13, 1908, for \$3,000, was executed. The latter note was also for ninety days, and recited that the same 2500 shares of mining stock were deposited with the note and pledged as collateral. Also, the recitations with regard to the rights on the part of D. M. Bell & Company, as payee, to sell the mining stock, were the same as in the note of February 13, 1908. At the time this note was given, neither Turley nor D. M. Bell & Company had the mining stock, as it had been sold. Turley testified, when asked why he did not tell Parkyn that the collateral was sold at the time the second note was executed, that "the firm was in a position at any time he, (Parkyn) desired to take up his note to replace that collateral, to go out on the market and buy these securities and deliver them to him upon payment of his note." Parkyn and the witness Carnahan, both testified that in a conversation with Turley, shortly prior to the assignment of D. M. Bell & Company, which took place in July, 1908, Turley admitted that the collateral had been sold because they were hardup. The testimony of Parkyn and Carnahan as to the conversation with Turley, goes to show very strongly that Turley, without right or authority, and in violation of the terms of the pledge, sold the mining stock which had been deposited as collateral to Parkyn's note. Some time in July, 1908, D. M. Bell & Company made an assignment. Prior thereto, in the latter part of May, 1908, Turley left D. M. Bell & Company, of which company he had been vice-president, and became an

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employee of the Dudley Tyng Company. The books of D. M. Bell & Company were not produced, the reason given being that after the assignee had finished his work the books were destroyed. Turley had acted as treasurer of D. M. Bell & Company. The witness Bell, who was president of D. M. Bell & Company, testified that three or four days before the assignment was made he told Turley that in justice to Parkyn they ought to make him the assignee. He also testified that Parkyn's credit with D. M. Bell & Company, from the time of the sale of the stock until the time of the assignment, was never less than \$4,000.

The declaration of the appellee, in the first count, avers that defendants "falsely, covinously, wickedly and maliciously, with the intent to cheat and defraud plaintiff, and without any rightful authority, sold, converted and disposed of said goods for the sum of \$10,000, to their own use, or to the use of the D. M. Bell & Company," whereby the property became wholly lost; and in the second count, avers that the defendants, intending to cheat and defraud the plaintiff, and without any rightful authority so to do, converted and disposed of said property to their own use, and misappropriated the property and the sum received therefor; that subsequently D. M. Bell & Company became insolvent, and said property became wholly lost to appellee.

The defendants, George R. Turley and David M. Bell, filed pleas of the general issue, and Turley, appellant, also filed a special plea, setting up that the sale of said property was in accordance with certain authority given in the collateral note.

employee of the Dudley Tyng Company. The books of D. M. Bell & Company were not produced, the reason given being that after the assignment had finished his work the books were destroyed. Turley had acted as treasurer of D. M. Bell & Company. The witness Bell, who was president of D. M. Bell & Company, testified that three or four days before the assignment was made he told Turley that in justice to Parrym they ought to make him the assignee. He also testified that Parrym's credit with D. M. Bell & Company, from the time of the sale of the stock until the time of the assignment, was never less than \$4,000.

The declaration of the appellee, in the first count, avers that defendants "falsely, covinously, wickedly and maliciously, with the intent to cheat and defraud plaintiff, and without any rightful authority, sold, converted and disposed of said goods for the sum of \$10,000, to their own use, or to the use of the D. M. Bell & Company," whereby the property became wholly lost; and in the second count, avers that the defendants, intending to cheat and defraud the plaintiff, and without any rightful authority so to do, converted and disposed of said property to their own use, and misappropriated the property and the sum received therefor; that subsequently D. M. Bell & Company became insolvent, and said property became wholly lost to appellee.

The defendants, George H. Turley and David M. Bell, filed pleas of the general issue, and Turley, appellant, also filed a special plea, setting up that the sale of said property was in accordance with certain

The case was tried before a jury. They found for the appellee, and upon their verdict a judgment for \$5,395.00 and costs was entered against appellant, Turley.

It is contended by the appellant that the court erred in permitting the appellee to give in evidence an alleged contemporaneous oral promise by Turley to notify appellee before selling the collateral deposited to secure payment of the note. Appellee, when called as a witness, testified that when he signed the first note he said to Turley, "of course I don't want to be sold out in this note." "If the stock should depreciate in value I want you to notify me. I can take up the note at any time, or I can put up additional collateral, but I simply don't want to be sold out. If you will telephone my office the matter will be taken care of;" that Turley, appellant, laughed and said "that was all right." Over the objection of appellant, the lower court admitted that testimony. In considering the competency of that testimony, it must be borne in mind that the suit was not upon the note, the terms of which, of course, cannot be varied by parol, but was a suit for the conversion of certain certificates of stock. The testimony, therefore, having in mind the issue under the pleadings, was not offered to prove that appellant did not have a right to sell the collateral security, according to the terms of the principal note, but was offered merely as part of the history of the transaction which ultimately culminated in the conversion of appellee's property; and as bearing upon the question of good faith. The conversion proven was not dependent upon a violation of any promise by appellant to appellee that he would notify appellee before sale;

The case was tried before a jury. They found for the appellee, and upon their verdict a judgment for \$5,385.00 and costs was entered against appellant, Turley.

It is contended by the appellant that the court erred in permitting the appellee to give in evidence an alleged contemporaneous oral promise by Turley to notify appellee before selling the collateral deposited to secure payment of the note. Appellee, when called as a witness, testified that when he signed the first note he said to Turley, "of course I don't want to be sold out in this note." "If the stock should depreciate in value I want you to notify me. I can take up the note at any time, or I can put up additional collateral, but I simply don't want to be sold out. If you will telephone my office the matter will be taken care of;" that Turley, appellant, laughed and said "that was all right." Over the objection of appellant, the lower court admitted that testimony. In considering the competency of that testimony, it must be borne in mind that the suit was not upon the note, the terms of which, of course, cannot be varied by parol, but was a suit for the conversion of certain certificates of stock. The testimony, therefore, having in mind the issue under the pleadings, was not offered to prove that appellant did not have a right to sell the collateral security, according to the terms of the original note, but was offered merely as part of the history of the transaction which ultimately culminated in the conversion of appellee's property; and as bearing upon the question of good faith. The conversion proven was not dependent upon a violation of any promise by appellant to appellee that he would notify appellee before sale;

it was the wrongful act of the appellant in misappropriating the plaintiff's property.

It is further contended by the appellant that trover will not lie in this case; that the pleadings and the evidence show that the matter arose ex contractu and not ex delicto. It seems to be the claim of the appellant, Turley, that as an employe of D. M. Bell & Company, finding the security scant and the mining stock speculative, it was decided by the directors that the security should be sold. The evidence shows, however, and justifies the conclusion that Turley, appellant, sold the certificates of stock which were the collateral, not owing to any depreciation in the value of said collateral, and not pursuant to any of the terms of the contract of pledge, as set forth in the principal note, but for the sole purpose of getting the proceeds for the benefit of D. M. Bell & Company. The situation is not similar to that set forth in the case of Loomis, et al v. Stave, 72 Ill. 623. In that case the evidence showed that collateral had been sold according to the terms of the principal note and failed to show a valid agreement for an extension of time; and the court held that trover would not lie. In the instant case, appellant sold the collateral a few days after they were received, and then when the new note was executed recited the same collateral as though they were still on hand; his theory being that if at any time the collateral were needed, for example, in case the principal note were paid, he could go out and buy stock of the same kind and amount. The evidence entirely fails to show that the sale of the collateral was made pursuant to the terms of the principal note, but it does tend to show that the sale was a pre-

it was the wrongful act of the appellant in misappropriating the plaintiff's property.

It is further contended by the appellant that trover will not lie in this case; that the pleadings and the evidence show that the matter arose ex contractu and not ex delicto. It seems to be the claim of the appellant, Turkey, that as an employee of R. B. Bell & Company, finding the security account and the mining stock speculative, it was decided by the directors that the security should be sold. The evidence shows, however, and justifies the conclusion that Turkey, appellant, sold the certificates of stock which were the collateral, not owing to any depreciation in the value of said collateral, and not pursuant to any of the terms of the contract of pledge, as set forth in the principal note, but for the sole purpose of settling the proceeds for the benefit of R. B. Bell & Company. The situation is not similar to that set forth in the case of Georgia, et al. v. State, 72 Ill. 623. In that case the court was shown that collateral had been sold according to the terms of the principal note and failed to show a valid agreement for an extension of time; and the court held that trover would not lie. In the instant case, appellant sold the collateral a few days after they were received, and then when the new note was executed recited the same collateral as though they were still on hand; his theory being that if at any time the collateral were needed, for example, in case the principal note were paid, he could go out and buy stock of the same kind and amount. The evidence entirely fails to show that the sale of the collateral was made pursuant to the terms of the principal

meditated misappropriation of the property of appellee. The case of Frederick & Sons v. The C. C. N. Bank, 153 Ill. App. 495, merely holds that a bank which receives property from another corporation, with the consent of all the stockholders, and turns that property into money, in the manner directed by them unanimously, is not liable in trover. Of course, the principle involved there is not applicable here. Turley, appellant, of course, is liable for his own tort; when he sold the collateral as he did, he was personally to blame and responsible for the conversion of that property. That he was an officer of D. M. Bell & Company, to whom the principal note was payable, and in whose possession the collateral was, does not change his liability.

As to the evidence in support of the verdict of the jury, finding that there was a conversion by Turley, appellant, it is not only ample, but in many ways it is overwhelming.

Some objections are made by Turley, appellant, to instructions numbered two, five, twelve and eighteen. The instructions, considered as a series, presented to the jury very fairly and completely the principles of law involved, and we do not find any material error therein.

Finding no error in the record, the judgment is affirmed.

AFFIRMED.

mediated misappropriation of the property of appellee. The case of Frederick & Sons v. The U. S. Bank, 154 Ill. App. 453, merely holds that a bank which receives property from another corporation, with the consent of all the stockholders, and turns that property into money, in the manner directed by them unanimously, is not liable in trover. Of course, the principle involved there is not applicable here. Tuttle, appellant, of course, is liable for his own tort; when he sold the collateral as he did, he was personally to blame and responsible for the conversion of that property. That he was an officer of U. S. Bell & Company, to whom the principal note was payable, and in whose possession the collateral was, does not change his liability.

As to the evidence in support of the verdict of the jury, finding that there was a conversion by Tuttle, appellant, it is not only ample, but in many ways it is overwhelming.

Some objections are made by Tuttle, appellant, to instructions numbered two, five, twelve and thirteen. The instructions, considered as a series, present to the jury fairly and completely the principles of law involved, and we do not find any material error therein. Finding no error in the record, the judgment is affirmed.

ATTORNEY.

Opinion of the Appellate Court

AT AN APPELLATE COURT, begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March, in the year of our Lord, one thousand nine hundred and seventeen, the same being the 27th day of March, in the year of our Lord, one thousand nine hundred and seventeen.

Present:

Hon. James C. McBride, Presiding Justice.

Hon. Franklin H. Boggs, Justice.

Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the Thirteenth day of April, A. D. 1917, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

206 I.A. 80

Royal L. Hamman, Admr.,

Appellee

ERROR TO
APPEAL FROM

vs.

City COURT

No. 3

October Term, 1916.

Illinois Central Railroad Co.,

Appellant

East St. Louis COUNTY

TRIAL JUDGE

HON.

ROBERT H. FLANNIGAN

Term No. 3.

In the Appellate Court,
Fourth District.

Appeals No. 7

October Term, 1916.

Charles J. Hamm, Administrator
of the Estate of William J. Hamm,
deceased,

vs.

et al.

Illinois Central Railway Company,
Respondent.

Appeal from the Circuit Court,
Fourth District, Illinois.

C. R. H. J.

A re-hearing was granted in this appeal on the October term, 1916, of this court for the reason that one of the members of the court felt that the trial court may have committed an error in giving defendant's instruction as framed or therein, but upon a further examination of the facts and investigation of the authorities we have concluded that the plaintiff's instruction as framed is correct and that the jury believed that the deceased "at the time of the injury" was exercising care, etc., and did not neglect to decide what period of time was covered by the phrase, "time of the injury" but appellant's instruction did not cover the period that was covered by this instruction and misled the jury, in effect, that it covered not only the time when he was struck by the train but immediately thereafter, and also the period of time when he was on the track. This was not in any manner contradictory of plaintiff's in-

struction but was merely supplementary, and in effect defined the term used by plaintiff in his instruction, and I do not believe that the jury could have been misled by this instruction.

After fully considering the evidence, the jury reached the opinion heretofore reported by this court and filed herein on the 17th day of April, 1917, and the law of this case correctly applied a decision is suggested and ordered to be re-filed as the opinion of this court in this case.

Not to be reported in full.

called the Inbound Track, the second the Outbound Track and the third the Yard Track. A pair of scales is located upon the Yard track and at a distance of about three hundred and fifty feet south of the Inbound crossing. An existing bridge roadway crosses these tracks at an angle about seventy-five or thirty degrees, and extends nearly northeast and southwest. The tracks at this point appear to intersect at the point where this roadway crosses them, and the center of the roadway is directly between the tracks in order to take an overpass to these tracks.

On the day in question the deceased, Miss Brown and a Mr. Abbot had been engaged at work in a field near this crossing, and, it being the noon hour, had come to work and were preparing to eat their dinner, and had been ordered to cross appellant's tracks. A short time before the deceased and Mr. Abbot undertook to cross the tracks, the appellant's servants pulled along this Yard track with an engine going up to the scales for the purpose of weighing some rails. The engine was on the south end of the track, and after weighing them, the engine pushed the load of rails to the north and toward Chapman's crossing, the engine being in the rear of the cars, and was running at the rate of from four to six miles an hour. At this time the engine was crossing along the Inbound track going in the same direction, toward the north, at the rate of about fifteen or sixteen miles an hour, and consisted of quite a number of cars of considerable length. Just about the engine and the four cars reached Chapman's crossing the deceased and Abbot walked upon the Yard track apparently engaged in watching the train

that was passing on the inbound track, and while they were upon the Yard track, the front car of the train upon that track struck them and killed them.

The declaration consists of three counts. The first one, after the recital of facts, charges that the said Philip Graham, with all due care and caution, was then walking across the said rail road at the cross crossing on the said public street, the defendant train and engine, by its said servants, so carelessly and improperly drove and caused the said locomotive engine and train to strike and knock the negligent and improper conduct of the defendant, by its servants in their behalf, the said locomotive engine and train and were pushing said train and car back in front of said locomotive engine on one of its said switch tracks, and did not give any flag-man at said crossing or any switchman or brakeman on the front car of said train; the said locomotive engine and train then and there ran and struck the said Philip Graham on and about the head and body with great force and violence, etc."

The second count, in addition to the allegations of the first count, charges the defendant with failing to ring the bell or blow the whistle upon approaching said crossing, as required by statute.

The third count, after setting forth the facts substantially as alleged in the first count of the declaration, avers the existence of an ordinance in the city of West t. Ohio requiring that the bell on locomotives shall be rung continuously while running within said city, and alleges a failure to ring the bell as is required by said ordinance.

The defendant filed a plea of not guilty.

The cause was heard by a jury, and a verdict and judgment rendered for \$100,000 in the amount of \$100,000.00.

The first point urged as error was that the declaration is that the negligence charged in the third count of the declaration is not that of careless and improper driving and managing the engine and train, but it is that of allowing the train of cars over the crossing without the aid of the crossing and without having a switchman or brakeman on the front car of the train, and concludes by saying that there is no law or ordinance requiring a flagman at said crossing or a switchman or brakeman to ride on the front end of the lot of cars traveling in broad daylight, and that the allegations are not sufficient to support a judgment. We do not believe that this declaration is subject to the criticism offered. It seems to us that the fair interpretation of the declaration is that the defendant, by its servant, improperly and carelessly drove and managed the said locomotive engine and train in this, that the said locomotive engine was then and there running said train of cars in front of the said locomotive engine on one of its said switch tracks and did not have any flagman at said crossing, nor any switchman or brakeman on the front car of said train, and that all of these elements are united in the count of constituting negligence, which we are inclined to think under the circumstances would constitute negligence and would be sufficient to sustain a judgment, especially after verdict.

It is next argued that the charge of negligence is not sustained by the evidence. There is no dispute but the train of cars was being run with too close an adherence to the track, and that there was no lookout upon the road in, or watchman at the crossing to guard against such accidents; and while it is true, as counsel say, that it is not specifically requiring a brakeman to be upon the road or a watchman at said crossing, yet these two facts are taken into consideration by the jury with all of the other evidence in determining whether or not, under the circumstances, the engine and cars were being driven so as to be carelessly.

The remaining counts of the declaration charge the negligence to consist of failure to ring the bell as provided by the statute and the ordinances of said city, and it is insisted that the evidence does not support the allegations contained in these counts. There was considerable conflict in the evidence as to whether or not the bell was rung; the fireman and engineer having testified that it was not, and stated that the bell was rung, while three witnesses, John Collins, Jerome Russell and John Hill, who were standing close by and in a position to hear the bell ring, testified that they did not hear it ring, and John Hill goes further that he was within about fifty feet of the locomotive and was looking at it all the time, and that he heard no bell ring, and at another place says the bell had not rung. This conflict of the testimony with reference to the ringing of the bell was very sharp, and the jury's opportunity to observe the witnesses while testifying would certainly have been much



better judges of who was telling the truth about this matter than we can be from the mere recital of the record.

It is next insisted that the deceased was guilty of contributory negligence because he is said to have so elevated that he could by looking have seen the train approaching and avoided the danger. While it is true that the deceased could by looking have seen the train approaching, the probability is that he did not, but the circumstances are that he was running upon the limited track at the same time, with no clear view of the evidence to have been sufficient to attract the attention of spectators; and the further distance of his traveling at such an angle that his back was partly toward this approaching train; that it approached so suddenly, and that he had the right to assume that such warning would be given on the approach to the crossing, were all matters to be considered by the jury as circumstances in which the jury might excuse the party from looking or listening.

The Courts lay down the doctrine "that a failure to look or listen, especially where it is a failure to do so, is evidence tending to show negligence, but is not conclusive evidence, so that a charge of negligence can be sustained upon such a failure of law, where the various modifying circumstances are shown, such as looking or listening, and that being the law, the failure to look or listen can not, by itself, constitute negligence." *See* *People v. Dunlap*, 119 Ill. App. 2d 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

239 Ill. 132. By that is to mean the application of the Supreme Court under such circumstances, it is a question for the jury to determine whether or not the deceased was in the exercise of due care for his own safety, and the jury is to be instructed that if the deceased was not in the exercise of due care for his own safety, then it is a question for the jury to determine whether or not the deceased was not guilty of contributory negligence.

It is not insisted that the court erred in giving the plaintiff's instruction, which is as follows: "The Court instructs the jury that if you believe from all the evidence in this case that the deceased at the time of the injury was exercising the degree of care that an ordinarily prudent person would have exercised under like circumstances; and if you believe from the evidence that the servants of the defendant were guilty of negligence as charged in the plaintiff's declaration, on any count thereof, and as a result of such negligence the deceased was injured, then you shall find the defendant guilty, and award the plaintiff such damages as you believe from the evidence to have been sustained by reason of the death of the deceased, if any."

The first objection urged is that the instruction limits the exercise of due care to the exercise of ordinary care and cites some authorities which are not authoritative. In answer to it is necessary to include in the instruction the words "ordinary care", as well as the time of the injury, and to say that the Supreme Court and this Court has frequently held that

under certain circumstances it is proper and even necessary to instruct the jury that it is necessary to examine the evidence of such and such a fact, or to do so before the trial of the injury; but even in such cases the instruction is not given, it is fully complied with, and the jury is not misled. In this case, the instruction is not in compliance with the plaintiff's instruction. The plaintiff's third instruction to the jury that before the plaintiff could recover it was necessary "that the deceased was, at the time the injury occurred, and immediately prior thereto, doing all that a reasonably cautious person would do under the circumstances to protect himself from serious injury or death." The plaintiff's instruction advises the jury that if they believe from the evidence that ordinary care required him to look before stepping upon the track "and if the jury believe from the evidence that the said deceased did not so look to ascertain the location of the train, and that he was struck and killed in consequence and because of such failure, if he did so fail to look and ascertain in such case, the court instructs the jury to find the defendant not guilty." These instructions are in direct contradiction of the plaintiff's instruction, and are, in fact, a complete denial of the plaintiff's instruction, and are, in fact, a complete denial of the plaintiff's instruction.

The second objection is that the instruction is not in compliance with the declaration that the plaintiff is entitled to a verdict. This has been discussed in a former part of this opinion.

The third objection is that it is not in compliance with the declaration to recover damages to plaintiff. The language of the in-

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court

at Mt. Vernon, this

20th

day of April.

A. D. 1917.



Clerk of the Appellate Court.

NOINIC

Opinion of the Appellate Court

AT AN APPELLATE COURT, begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March, in the year of our Lord, one thousand nine hundred and seventeen, the same being the 27th day of March, in the year of our Lord, one thousand nine hundred and seventeen.

Present:

Hon. James C. McBride, Presiding Justice.

Hon. Franklin H. Boggs, Justice.

Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the Thirteenth day of April, A. D. 1917, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

Matthew Smith, et al,

Defendants in Error

vs.

No. 12

October Term, 1916.

Henry Smith, Exec., et al,

Plaintiffs in Error

206 I.A. 86

ERROR TO
APPEAL FROM

Circuit

COURT

Loyette

COUNTY

TRIAL JUDGE

HON.

M. B. WRIGHT



Term No. 18. In the Supreme Court, Docket No. 18
Fourth District.
October Term, 1916.

Matthew Smith, et al,
Defendants in error.

vs.

Henry Smith, Executor, etc. et al, Plaintiffs in error.
Circuit Court of Cassette
County, Indiana.

McCabe, J.

The defendants in error, hereinafter called "defendants", filed a bill in the Circuit Court of Cassette County against the plaintiffs in error, hereinafter called "plaintiffs", to contest the will of Fredk. Smith. The court found that the will in question was not the will of the testator and decreed accordingly. To reverse which this writ of error is prosecuted.

It appears from the record in this case that the testator, Fredk. Smith died on December 11, 1907, at the age of ninety years and that he left as his only heirs, Matthew and Jobe Smith, Martha Young and the plaintiff, Henry Smith. The testator and his wife resided upon a farm of seventy acres in Cassette County, owned by the testator, until the death of his wife which occurred near January 1911. His children had all married and were heads of their own. After the death of his wife the testator was sick, and according to the testimony, was (or was) mentally. His children ordered him a home and he undertook to live with some of them but very soon after

satisfied and longed to return to his old home. In April 1911 the testator entered into a contract with the plaintiff by which he gave to the plaintiff a one-half interest in the home place and sold her the remaining one-half for one thousand dollars, for which the plaintiff gave him note and entered into a contract to keep and care for her father during his life time in consideration of payment of one-half of said premises. The testator had but little property besides this note at the time of his death and no real estate at all. It further appears that on June 1, 1911, the testator executed the will in question, giving to the plaintiff all of the property of every kind owned and possessed by him. The will was drawn by the attorney of plaintiff; the plaintiff took the testator to town for that purpose and went out on the streets and secured for him the witnesses to the will, two of whom in the examination said they thought he was at that time of sound mind but the third witness, J. M. Campbell, testified that he was not very capable of doing very much business. It does not appear from the evidence that the testator did such, if any, business after his wife's death. The testimony introduced by the estate and proponents of the will consisted chiefly of the testimony of neighbors and acquaintances who met him and talked with him and gave their opinion; some of them saying he was of sound mind and others that he was not. It also appears from the evidence that just before the execution of this will the testator told Ed Smith, a son of the plaintiff, that Ed Smith had told him that the defendant was going to be appointed conservator for him and at this he became angry and in-

immediately set about making his will; but the evidence introduced that he ever told anything of the sort or that was testified to or that the defendant ever made any statement of that kind or character.

It is contended by counsel for the plaintiff that the verdict of the jury is not supported by the evidence. It is true that the evidence in this case consists almost entirely of opinions formed from conversations had with the testator at different times and not very soon, in fact, after reference to business transactions, and the witnesses differed in their opinion as to the capacity of the testator, some of them being of the opinion that he was capable of transacting business and others that he was not. The case of *Riper vs. Andricke et al*, 202 Ill., 504, was very similar in its aspects and in the character of the testimony that was introduced as to the mental capacity of the decedent, and the Supreme Court upon a review of that case said, "A large number of witnesses were called who testified they were of the opinion the testator had testamentary capacity, while an equal or greater number testified in their opinion he did not. The jury heard these witnesses testify, and it was necessarily within their power to determine which were the more worthy of belief. The trial judge also saw and heard the witnesses and approved of the verdict of the jury. In that state of a record this court will not disturb the verdict unless it is manifestly against the weight of the evidence, which is not the case here." We are not disposed to say that the verdict of the jury in this case is manifestly against the weight of the evidence and not inclined to disturb its finding.

It is next insisted that there is no evidence whatever that Henry Smith or any other person ever used undue influence over the testator to procure this will. Under the evidence in this case it was developed that the deceased procured his son, the plaintiff, to come and live on the farm place and keep the father as long as he lived, and to secure the consent of the son to do so a contract was entered into whereby the father sold the son a tract to seventy acres of land, all the land owned by the deceased. Under this agreement the plaintiff was to feed and care for the father as long as he lived and for that he was given one-half of this land and the father sold him the other one-half for one thousand dollars, for which the son gave a note and entered into a written contract for the care of his father, so that so far as concerning the son for his care and maintenance, that was being fully settled, and there was no occasion for further consideration. It was also developed that there was a friendly feeling existing between the father and the other children. They had offered him a home with them. He had gone to live with some of them, especially the one that lived in Oregon, but was not satisfied, did not like to live so far away and longed to return to his old home on the farm. From the evidence contained in this record we can not get any hint of a friendly relation existing between the father and his other children. About two months after the old man had come to live with his son, Henry, it developed that a will was made giving Henry the remainder of the property; Henry had taken him to his own attorney at Vandellia and there the will was

written and Henry went out and secured the witnesses for the will, and by this instrument the other children were deprived of any part of the estate, and without any cause as we can see therefor. While it is a fact of inequality of distribution is not of itself conclusive evidence of undue influence yet it may be considered as a circumstance tending to establish undue influence in connection with the other facts and circumstances proven in the case. Henry was at least instrumental in taking the deceased to his attorney and securing witnesses and assisting what he could in making his father, an old man eight-and-a-half years old, weak in mind, enfeebled in health, to make this will. While inequality in the distribution of property is not of itself conclusive evidence of undue influence, yet it may be considered as a circumstance, tending to establish undue influence, in connection with all the other facts and circumstances in the case". *England vs. Lyman*, 194 Ill., 134; *Webster vs. Fort*, 194 Ill., 48.

It is said by counsel for plaintiff, as to the cause for the making of the will as it was made, that the other heirs had threatened to have a conservator appointed for the testator and that he, Henry, at them on that account. Counsel argues that Elias Doe, a very hostile witness to the proponents and a very friendly witness to the defendants, did tell the testator that he had been to Lendalia and saw Matthew and the other children and that they were going to appoint a conservator for him. He also secured testimony and had no such testimony by the contrary and else. The only evidence upon this question was that introduced by the plaintiff.

tiff himself, where son d ways, I never remember any that Mr. Roe told him that Matthew and John and Walter came to town to appoint a conservator: he said he would know that whether he was crazy or not. He said he would find them so they would get nothing". The plaintiff introduced this testimony evidently for the purpose of showing reason for inequality in the distribution of the property but no one testifies that Roe told him this or that there was any act done upon the part of the other children to appoint me, or that any threat had been made to do so. It is argued by counsel that Roe was unfriendly to the plaintiff and friendly to the defendants. There is nothing in this record that we are able to find that warrants us in believing that such was the case. Roe in his testimony was certainly more favorable to the plaintiff than the defendants. Defendants could not have called upon Roe to prove any declarations that they had made to him but the plaintiff could have done so but did not do it. It is true it was developed by the testimony that this impression was upon the old man's mind but it was not brought about by the contestants, at least there is no evidence of it. The plaintiff did not seek to prove that such threats had actually been made when he was present and could have testified to it if true. It is for the jury to determine whether or not the deceased died acting under an impression that was true or under one that had been inspired or engendered from other sources. Whether or not the testator was unduly influenced in the making of this will was under the facts and circumstances proven in this case a matter entirely for the jury. Under the

decisions of this court, that where want of testamentary capacity, undue influence or fraud is charged, that all of the surrounding facts, including the will itself, its propriety or impropriety, its reasonableness or unreasonableness, in view of the situation, relations and circumstances of the testator, may be considered as bearing upon the issues thus raised." *Howie vs. Sutton*, 207 Ill. 413.

While it is true that under the law where a man is competent to make a will, and is not unduly influenced, he has the right to dispose of his property as he sees best to do, yet under the circumstances in this case the jury found that the deceased was unduly influenced and we can see no reason why such finding should be disturbed by this court.

It is complained that the court erred in giving instruction five. The criticism upon this instruction is that it does not require proof of undue influence. We do not believe that the criticism is well taken as it only explains the effect of such influence, and instruction four just preceding it fully explained the meaning of undue influence, and the proof required.

It is said that instruction six does not point the jury where the false impressions must come from or that they must be proven to be false but leaves the jury to guess or assume they were false. We do not believe that the instruction bears this construction or that even if it did it would be sufficient to reverse the case.

We are unable to say from this record that the verdict of the jury is manifestly against the weight of the evidence and do not feel warranted in disturbing it accordingly, and the decree of the lower court is affirmed.

Justice Logan Dissenting.

Not to be reported in full.

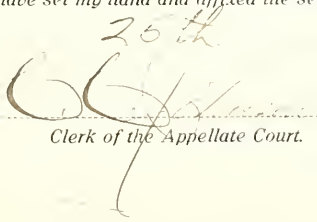
I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court

at Mt. Vernon, this
A. D. 1917.

25th

day of April,


Clerk of the Appellate Court.

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Opinion of the Appellate Court

AT AN APPELLATE COURT, begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March, in the year of our Lord, one thousand nine hundred and seventeen, the same being the 27th day of March, in the year of our Lord, one thousand nine hundred and seventeen.

Present:
Hon. James C. McBride, Presiding Justice.
Hon. Franklin H. Boggs, Justice.
Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk. THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the Thirteenth day of April, A. D. 1917, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

206 I.A. 87

Sue B. Loudon and Mildred Loudon	}	Circuit	COURT
Executrices,			
Plaintiffs in Error			
vs.	}	St. Clair	COUNTY
No. 13.			
October Term, 1916.			
Terminal Railroad Association	}	St. Clair	COUNTY
of St. Louis et al,			
Defendants in Error			

TRIAL JUDGE

HON. W. B. WRIGHT



Term No. 18. In the Appellate Court, Second and
Fourth District.
October Term, 1916.

Ella M. Louden and
Edith Louden,
Executrices of the estate
of Walter C. Louden, deceased.
Plaintiffs in error.

vs.

Terminal Railroad Association of St. Louis,
Terminal Railroad of East St. Louis and St. Louis,
J. Winstanley,
Defendants in error.

Error to the
Circuit Court
of St. Louis
for the
Second District

Corrigan, P.J.

The trial of this case resulted in a verdict and judgment for the defendants, which is sought to be reversed by this writ of error.

It appears from the record in this case that the defendants are possessed of and control several railroads in the city of East St. Louis, extending from the vicinity of the Relay Depot north and south across the Mississippi River to the city of St. Louis. The railroad tracks that were of importance in this trial were designated 16, 17, 18, 19 and 20. Track 19 was the furthest east of the several tracks and the nearest to the Relay Depot. On the east side of track 19 a platform had been constructed of the width of thirteen feet, and was about 650 feet long, and extended down to and connected with a subway under said track, and also connected with a board crossing from the south end of

said platform, extending across the said railroad tracks and others to the relay depot. The subway and said platform have been constructed some time prior to the inquiry at Winter Haven, and the platform was built on timber tracks in said city. It is being immediately upon the east side of the platform and is on the west of it. At the time of the inquiry, however, the subway was closed for repairs. On the evening of December 4, 1914, the deceased Walter Louden purchased a ticket at the Union Station, St. Louis, Missouri, from the Terminal Railroad Association of St. Louis, and the Terminal St. Louis and Eastern Railroad Company, which entities were restricted upon their tracks as passengers from St. Louis, Missouri to the city of West St. Louis. There were certain arrangements made between this railroad and the Terminal Railroad Association by which the Terminal Railroad cared for the passengers of the Toledo road and conveyed them over the bridge to West St. Louis. After the purchasing of the ticket Walter Louden entered one of the cars of the said Toledo, St. Louis and Western Railroad Company and was conveyed over to the city of West St. Louis, and the train stopped upon track 16, opposite the platform that had been constructed by the railroad company to receive passengers. Walter Louden was in the front car and when the train started instead of alighting upon the platform on the west side of the train he alighted upon the east side of the train and attempted to cross over the tracks of the defendant, but in so proceeding out in the switch yard, to reach the relay depot. There was a wooden platform of the width of about fifteen feet extending from it or near the relay depot across the said railroad tracks to the south end of said platform located on

the west side of track 16 as aforesaid. The point at which Loudon alighted from the car and attempted to cross the tracks was about seventy feet north of this board crossing. It was about 6:30 p. m. and dark at the time the train stopped at the platform. There is some dispute as to how well the platform and the tracks in the vicinity thereof were lighted but there were good lights and some of the witnesses testified that you could see objects very well in that vicinity. There was a cut-over from track 16 to track 17 in the vicinity of where Mr. Loudon alighted from the train and to reach track 16 he had to get over the tracks of two or three railroads. It appears from the evidence that there were other persons besides Mr. Loudon who alighted from the train on the east side. At this time it appears that there was a string of eight freight cars still north of Mr. Loudon upon track 16; five of them were ahead of the engine and three north of the engine; the engine was headed south and at about this time Mr. Loudon had started across the tracks and about the time he reached track 16 he was struck by the south car of this train of freight cars, knocked down and injured, from which he afterwards died. It appears that this train of freight cars was moving at the rate of from four to six miles per hour, and that the defendant Winstanley, who was head brakeman, was standing on the top of the south car with a lighted lantern in his hand. That as Mr. Loudon moved across the several tracks he walked with his head bowed down and apparently did not see the train of freight cars until about the time he was struck by it. When the train of freight cars was within fifty feet

feet of Loudon, several persons in the immediate vicinity hallooed at Mr. Loudon and Winstanley also hallooed at him and about the same time a nearby engine blew an alarm whistle and Winstanley gave a short alarm signal to his engineer but it was too late, the car struck Mr. Loudon and he was fatally injured. Mr. Loudon was an attorney and business man in East St. Louis and almost daily made trips to and from Trenton, Illinois for several years, where he then lived, and during the last year of his life he had lived at Waterloo, Illinois, and also made daily trips to and from this place, all the time taking trains at this station and was well acquainted with the surrounding conditions that existed there. He enjoyed a lucrative law practice, and as was claimed by the witnesses, had an income of nine or ten thousand dollars per year therefrom. He left surviving him a widow and three children.

The first count of the declaration charged that the defendant did not carry said Walter Loudon to his destination at Relay Station in safety and did not give him an opportunity to alight from said train and proceed to said station in safety. The second count charges that the defendants negligently failed to provide a safe means of passage for the said Loudon from the point where he had alighted from said passenger train to said Relay Depot. The third count charges the same acts of negligence, together with a failure to maintain adequate lights so that the passengers could cross over the railroad tracks in safety. The fourth count charges that the defendants

operated and permitted to be operated a locomotive engine and cars upon and over other tracks of said railroad company which the said Loudon was required to pass, in violation of the ordinances of the city of West St. Paul, in that there was not kept upon the rear car of said freight train a brilliant and conspicuous light.

Some of the counts combined the acts of negligence specified in the other counts and presented them as a combination.

The fifth count of the declaration charges that the defendants wilfully and wantonly ran and operated along and upon one of its railroad tracks the freight train above described, without warning the said Loudon of the approach of the train, and at a high and dangerous rate of speed, and that the crew operating said train wilfully and wantonly ran the said Walter Loudon down as he was attempting to cross the said track.

It is contended by counsel for plaintiff in error, hereinafter called plaintiff, that it appears from the evidence in the case that the defendants were negligent, and at the conclusion of their argument upon the first proposition counsel, after stating that the only defense offered was contributory negligence, say "And we respectfully insist that in view of the circumstances surrounding Mr. Loudon at the time of his injury, and relation of carrier and passenger existing between him and the defendant railroad companies, the verdict of the jury which must have been based on the theory that he was guilty of contributory negligence was wholly unsupported by the testimony.

Let us assume, as contended by plaintiff, that the defendants were guilty of the negligence as claimed, this, however, would not be sufficient to warrant a verdict upon the first four counts of plaintiff's declaration. The plaintiff as to these counts must go further and prove that the deceased was at the time in the exercise of due care for his own safety, or in other words, was not guilty of contributory negligence, and as we view it, the only question that is necessary to be considered as to these counts is, "Was the jury warranted in finding that the deceased was guilty of contributory negligence". The question of contributory negligence was one of fact and if such facts were proven as would warrant the jury in finding the deceased guilty of such negligence then unless such verdict was manifestly against the weight of the evidence this court would have no right to disturb its finding. It appears from the evidence that Mr. Loudon instead of alighting from the train on the platform that had been prepared for exit of passengers, and which he certainly knew of, alighted from the on a side side and undertook to cross the several tracks at the distance of some seventy feet north of where a board crossing had been prepared for passengers to travel upon. He did not make his exit from the train at the place prepared by the company for passengers to alight. While it may be true that it can not be said as a matter of law that a passenger would be guilty of contributory negligence in getting off of a train at a place other than that prepared for his exit, if one had been prepared, yet it certainly is a fact to be considered by the jury in determining whether or not he was justified

in leaving the train in that manner, and we think this doctrine is fully sustained in the case of Illinois Central Railroad Co., vs. Glemoefer, 76 App., 672. Illinois Central Railroad Co. vs. Green, 61 Ill., 16. This would be wholly different from a case where a passenger had been invited by the crew, or some of them, to leave the train at a place other than that provided by the company. The line of cases referred to by counsel for plaintiff seem to be of that character, where there was an invitation or some other excuse for leaving the train at a place other than that provided by the company, but in the case of *Ill. Ry. Co. vs. Winters*, 178 Ill., 293, the court in discussing that question says, that where one obeys instructions or directions of another, upon whose assurance he has a right to rely, he cannot be charged with contributory negligence at the instance of such other person, and cites several authorities sustaining this position, among them the case of *Lea vs. Rich. Ry. Co.* vs. Brown, 123 Ill., 162, and other cases, and later, in commenting upon this case the court further said, "It was said in *Chicago and Alton Railroad Co., vs. Wilson*, 200 Ill., 123, that railroad companies have no right to invite the traveling public to occupy positions of peril. In all the cases above referred to, where a passenger disembarked from a train at a place of danger, or went from a safe place on a train to enter a part of the train which was dangerous, and was injured in so doing, and where it was held that such passenger was not entitled to a right of recovery of damages for such injury against the railroad company, it appears that such movement of the passenger, in alighting from the train or in changing his position on the train, was not done

by any direction or invitation of the conductor of the train or other servant of the company". In determining whether or not the deceased was guilty of contributory negligence, the jury had a right to consider the fact that he alighted from the train at a place not provided for passengers, and that he was walking along and passed over these tracks at what he must have known was a dangerous place, with his head bowed down and apparently oblivious to things that were transpiring around him, and they also had the right to take into consideration and determine whether or not it was negligence in him to attempt to cross the tracks without looking to see if a train was approaching, and the jury were the judges of that fact. There were quite a number of persons in the vicinity of where Mr. Loudon was injured that saw this freight car and saw it moving and saw it moving in the direction of Mr. Loudon and it was for the jury to determine whether or not, in the exercise of due care, he should have seen it. If he had seen the car moving he certainly would have stopped and permitted the car to pass by. We are unable to say that the verdict of the jury was manifestly against the weight of the evidence in determining that the deceased was guilty of contributory negligence.

It is insisted by counsel for plaintiff that the court erred in giving the defendant's first, third, fourth and fifth instructions, in this, that the ninth count of the declaration charged that the acts complained of were wilful and wanton and that by these four instructions the jury were told that the plaintiff could not recover unless it appeared from the evidence that he was in the exercise of ordinary

care for his own safety, and the contention is that under this count of the declaration it was not necessary to prove that the plaintiff was in the exercise of due care for if the defendants were guilty of the willful and wanton acts then a liability accrued to the plaintiff, regardless of his negligence. As we understand the law, this position is correct and if the evidence fairly tended to show that the acts were willful or wanton then these instructions would take from the jury entirely the consideration of this count of the declaration. It must appear from the record, however, that there was evidence tending to support this count in order that these instructions may be regarded as erroneous. It was said in the case of *Whrlich vs. Chicago West Western Railroad Co.*, 160 App., 382, "In the *Mingley* case supra, appellee, the plaintiff was a trespasser, and it was held that he could not recover unless the act was wanton and wilful. We conclude from these authorities and from *I. J. & M. Ry. Co., vs. Bodemer*, 139 Ill., 596; *Seabash M. Co., vs. Speer*, 126 Ill., 244; *I. J. & M. Ry. Co., vs. Ruffy*, 101 Ill., 469, and *Chicago Union Traction Co. vs. Mcinnis*, 112 Ill. App. 177, that if the acts and omissions here relied upon were proved and were wanton and wilful, appellee could recover without proof that he was in the exercise of due care for his own safety". We think that the crucial question in determining whether or not the instructions given were erroneous is, did the proof show or fairly tend to prove that the acts were wanton and wilful. The acts charged and complained of as being wanton and wilful are that the crew managing said train operating the string of freight

cars operated the same wilfully and wantonly, in total disregard of the safety of Mr. Loudon, and operated the same along said railroad track at a high and dangerous rate of speed without giving warning to Loudon and thereby wilfully and wantonly ran the said Walter Loudon down as he was attempting to cross said track. It is said by the Supreme Court of this State, in the case of I. C. Railroad Co. vs. Licher, 202 Ill., 631, in quoting approvingly from Thompson's Commentaries on the Law of Negligence, that, "An entire absence of care for the life, the person or the property of others, such as exhibits a conscious indifference to consequences, makes a case of constructive or legal willfulness, such as charges the person whose duty it was to exercise care, with the consequences of a willful injury." Many authorities have been cited by plaintiff and defendant to the same effect and the question now is, were these acts such as exhibit a conscious indifference to the consequences? The train was being operated at a rate of from four to six miles an hour, a brakeman with a lighted lantern was on the foremost car and his lantern was in a conspicuous place and was, so far as we can see, in accordance with the ordinance of the city of East St. Louis. It certainly, from all of the evidence, was sufficiently conspicuous that persons in the vicinity could see in which direction the car was moving. The rate of speed at which the car was moving could not be considered as wanton or willful for in the case of I. C. Ry. Co. vs. Licher, 202 Ill., 633, the Supreme Court says, "In Illinois Central Railroad Co. vs. Betherington, supra, where a train was running at the rate of fifteen miles an hour in violation of an ordinance, it was held that the speed of the

train could not alone be regarded as a sufficient reason for holding that the injury was willful or wanton, and the language there used was quoted and approved in *Blackard vs. Lake Shore and Michigan Southern Railway Co.*, 130 Ill., 416.* The case of *Beice vs. Chicago & Alton R. R. Co.*, 154 Ill., 595, and others cited by plaintiff are wholly different from the case now under consideration. In that case the train was running at a high and dangerous rate of speed, thirty-five to forty miles per hour, without a head light, and running through a place where persons were expected or liable to congregate, and while it is true that persons were liable to congregate here the train had no such a speed but was running at that rate at which it could be stopped on very short notice, and the light was conspicuous. Assuming that the brakeman saw Mr. Loudon approaching the track for some distance before reaching the point where he was injured, could it be said that he was guilty of a wanton or willful act in allowing the train to proceed? He had a right to assume that Loudon would see the train moving and would act as a reasonably prudent man and not step upon the railroad track in front of the moving train. *Hartlett vs. Babash*, 100 Ill., 163. It is evident from this testimony that the defendant Winetankley did not realize that Loudon was oblivious to what was going on around him until they were within a very few feet of him, and about the same time when one of a nearby engine and others realized the same, and at about that time the engineer blew the whistle, others yelled at Loudon and the brakeman gave the quick stop signal. Even though these acts may have been negligent (which we have not dis-

cussed in this opinion) we think they are very far from being wanton and wilful, and there being no evidence to support this theory of plaintiff's case the giving of the instructions was not erroneous.

The first instruction given on behalf of defendant is also complained of because it announced the rule that if burden had looked and by the exercise of ordinary care could have ascertained the approach of said train along said track in time to have avoided injury, and did not look then he could not recover. We do not believe this instruction is subject to criticism because it provides that if ordinary care required him to look and that he was guilty of negligence in not looking, and could by the exercise of ordinary care have ascertained the approach of said train and avoided the injury, it was his duty to do so. We see nothing wrong with this instruction and know of no reason why it should have been refused.

We think that the criticism upon instruction No. 1 is without merit. The jury had the right to act upon the evidence as the court permitted it to be received by them, and if they had been directed to pick out the material part and act upon that this would have been erroneous, unless the material parts had been explained. The objection is not well taken.

While we are of the opinion that the accident, injury and loss to this family is to be very much deplored, yet we are unable to say from this evidence that the jury erred in finding that the deceased was not in the exercise of due care for his own safety or that the acts were wanton and wilful upon the part of the defendants, and the judgment of the lower court is affirmed.

JAMES M. HARRIS.

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

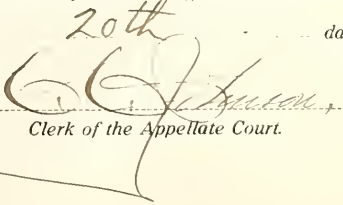
IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court

at Mt. Vernon, this....

20th

day of April.

A. D. 1917.


Clerk of the Appellate Court.

3073

Opinion of the Appellate Court

AT AN APPELLATE COURT, begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March, in the year of our Lord, one thousand nine hundred and seventeen, the same being the 27th day of March, in the year of our Lord, one thousand nine hundred and seventeen.

Present:
Hon. James C. McBride, Presiding Justice.
Hon. Franklin H. Boggs, Justice.
Hon. Harry Higbee, Justice.
CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the Thirteenth day of April, A.D. 1917, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

Maunie Banking Company,		206 I.A. 90
Appellant		
vs.		*ERROR TO APPEAL FROM
No. 18		Circuit COURT
October Term, 1916.		
John Eplin,		White COUNTY
Appellee		

TRIAL JUDGE

HON. JULIUS C. KERN

Term No. 18. In the Appellate Court, Agenda No. 45.
Fourth District.
October Term, 1916.

Laurel Banking Company,) Appellant.)	Special from the Circuit Court of White County.
vs.)	
John G. Lin,) Appellee.)	

McRide, R. J.

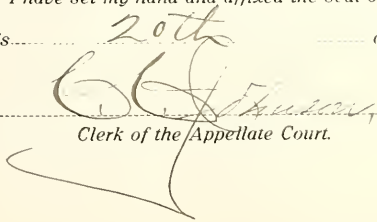
It appears from the files in this case that the appellee failed to file a brief herein as required by the rules of this court, and for that reason the judgment of the lower court will be reversed pro forma. Rule 11, provides, "Briefs for appellee or defendant in error must be filed within ten days after the time fixed for filing briefs for appellant or plaintiff in error, or within such further time as may be granted by the court on motion; and if not so filed the judgment or decree of the court below will be reversed pro forma, etc." The appellee neither filed a brief nor asked an extension of time herein. It is therefore ordered that the judgment of the lower court be reversed pro forma, and the cause remanded.

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court

at Mt. Vernon, this..... 20th day of April,
A. D. 1917.


Clerk of the Appellate Court.

PINION

3077

Opinion of the Appellate Court

AT AN APPELLATE COURT, begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March, in the year of our Lord, one thousand nine hundred and seventeen, the same being the 27th day of March, in the year of our Lord, one thousand nine hundred and seventeen.

Present:

Hon. James C. McBride, Presiding Justice.

Hon. Franklin H. Boggs, Justice.

Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the Thirteenth day of April, A. D. 1917, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

O. W. Richardson & Co.,

Appellant

vs.

No. 21

October Term, 1916.

Edward Steinfort et al,

Appellees

206 I.A. 91

ERROR TO:
APPEAL FROM

Circuit

COURT

Jasper

COUNTY

TRIAL JUDGE

HON.



Term No. 21. In the Appellate Court, Agenda No. 4
Fourth District.
October Term, 1916.

G. F. Richardson & Company,)	
Appellant,)	
vs.	)	Appeal from Jasper County
Edward Steinfort and Richard	)	Circuit Court.
Steinfort,)	
Appellees.)	

McBride, R. J.

The Circuit Court rendered judgment against appellant for costs, to reverse which the appellant prosecutes this appeal.

It appears from the record in this case that at some time prior to September 3, 1914, the appellees ordered of appellant four rugs, one of which was an Axminster rug valued at \$16.50. The appellant claims to have shipped these rugs on September 3, 1914 to appellees at Willow Hill, Illinois. The appellees admit that they received three rugs but deny that they received the axminster rug. On September 11th the appellees advised appellant that they had not received the rug in question and requested appellant to trace it and forward it at once. After considerable correspondence with reference to this rug the appellees, on October 7, 1914, again advised appellant that the rug shipped on the 3rd of September had not arrived and that if they could not trace

THE SECRETARY OF THE
TREASURY
WASHINGTON, D. C.

DEAR SIR:

RE: [illegible]

[illegible]

[illegible]

[The following text is extremely faint and largely illegible. It appears to be a formal letter or report, possibly discussing financial matters or government operations. Key words that are partially discernible include "The Secretary of the Treasury", "Washington, D. C.", "Dear Sir", and "RE:". The body of the letter contains several paragraphs of text, but the specific details are lost due to the quality of the scan.]

it to ship another at once and on October 6th another rug of the same pattern was shipped to appellees, which was received by them, and on December 7, 1914, appellees sent appellant a check for \$10.00. It further appears from the evidence that the freight bill for the shipment of September 3rd, 1914, was marked "short" but there is nothing in the record to show when or by whom it was so marked. It is insisted by counsel for appellant that inasmuch as the rug in question was delivered by the appellant to the railroad company and consigned to the appellees unconditionally that this was in effect a delivery by appellant to the appellees and entitled appellant to recover for the value of the rug. This proposition of law is a correct one, as we understand the law, unless there was a contract or agreement to deliver the rugs at Willow Hill. The appellee E. H. Steinfort in his testimony says that the rugs were to be delivered to him at Willow Hill and this is not denied, nor was the order, if any was made, for the shipment of the rugs introduced in evidence and we think that the court was warranted in finding that the rug was to be delivered at Willow Hill, and that the principle of law invoked by the appellants would not be applicable to the facts in this case. It further appears from the record that there is no evidence introduced showing that appellants delivered the rug to the railroad company. It was sought to prove this fact by the introduction of the bill of lading that was issued at the time of the shipment of September 3, 1914. Appellant instead of offering the original bill of lading in evidence offered a copy of it which was objected to and the objection sustained by

court. There was also a copy of the freight bill received by the drayman of appellees which was marked "short" but no one seems to know or understand just how this freight bill came to be marked "short". The appellee, J. W. Reinhardt, testifies that it was marked "short" when he received it and that it was in fact short the rug in question. The evidence introduced by appellant upon the question of the delivery of the goods to the railroad company did not identify the rug in question as being in the bundle of goods shipped and in fact did not show a delivery of even the bundle of goods to the railroad company. It was further developed upon the trial that there was considerable correspondence between the parties with reference to this rug, the appellees insisting all of the time that the rug was not delivered to them and appellants were apparently satisfied with that fact until in tracing the bundle of rugs shipped out it developed that the freight bill for the bundle of rugs was signed up by the drayman of appellees. The trial court heard the testimony of the witnesses in open court and saw the conduct and demeanor of those who did not give their deposition and was better able to tell whether they were speaking the truth about this matter than we are, and in view of the indefiniteness of the testimony as to the delivery of the rug in question to the railroad company and the positive denial of the appellees that the rug was received, and in the further consideration of the fact that the appellee J. W. Reinhardt testified that the goods were to be delivered to Miller Hill, we are unable to say that the finding of the Circuit Judge was manifestly against the weight of the evidence, and the judgment of the Circuit Court is affirmed.

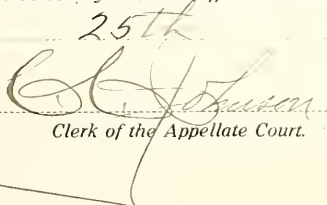
JUDGMENT AFFIRMED.

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court

at Mt. Vernon, this 25th day of April,
A. D. 1917.


Clerk of the Appellate Court.

NOINIC

Reg 3176

Opinion of the Appellate Court

AT AN APPELLATE COURT, begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March, in the year of our Lord, one thousand nine hundred and seventeen, the same being the 27th day of March, in the year of our Lord, one thousand nine hundred and seventeen.

Present:

Hon. James C. McBride, Presiding Justice.

Hon. Franklin H. Boggs, Justice.

Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the Thirteenth day of April, A. D. 1917, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

Laura Snodgrass, Admrx.,

Appellee

vs.

No. 26

October Term, 1916.

Wilson and Cotter, Receivers,

C. P. & ST. L. R. R. Co.,

Appellants

206 I.A. 99

ERROR TO
APPEAL FROM

City

COURT

Alton, Ill.

COUNTY

TRIAL JUDGE

HON.

J. I. DUNEGAN

12



Term No. 26.

In the Appellate Court,

Agenda No. 25

Fourth District.

October Term, 1916.

Laura Snodgrass, Adm. of the
estate of John W. Snodgrass, deceased,)
Appellee.)

vs.)

Cluford Wilson and William Cotter,
Receivers, Chicago, Peoria &
St. Louis Railroad Company,
Appellants.)

) Appeal from the City
Court of Alton,
Illinois.

McNride, J. J.

The plaintiff recovered a judgment against the defendant for \$989.00 and costs, to reverse which judgment this appeal is prosecuted.

It appears from the record in this case that on August 3, 1915, at about 5:30 o'clock in the afternoon, John W. Snodgrass, husband of the appellee, was struck and injured by a passenger train of appellant's in the city of Alton, from which injuries he shortly thereafter died. The deceased was of the age of fifty-eight years and a teamster by occupation.

It appears from the evidence in this case that the railroad tracks of appellant and that of the Illinois Terminal Railroad ran parallel to each other, east and west through the eastern part of the city of Alton, crossing Main Street and other streets of the city extending north and south. The deceased on the evening in question was

going from some point west of Plum Street to care for some hogs that he or his son had charge of, south or east of Plum street. The first that was seen of him he was going east between Vine and Monument streets traveling between the tracks of the appellant and the Illinois Terminal Railroad, and upon reaching Plum Street he turned to the south to cross appellant's track and had so far crossed the track that he was either standing on the tie or at one foot over the south rail of the track and was in this position when he was struck and injured by appellant's train. There were no objects of any kind to shut off the view of deceased from seeing an approaching train, and the track was straight with an unobstructed view to the west for the distance of four to six hundred feet. When the deceased reached the point at where he was standing on the end of the tie with one foot across the south rail he stopped and stood there for some little time without any apparent reason therefor. Some of the witnesses say there was a boy and woman close by and the deceased was apparently engaged in a conversation with this woman.

It further appears that as he undertook to cross the track his head was drooped and he did not look either way to see if there was an approaching train, and the evidence shows that the day was clear and had he looked to the west he could have seen the train approaching him from that direction. The testimony further discloses that immediately before striking the deceased the engineer blew three or four shrill blasts of the whistle but it appears that the engine was very close to him when these blasts were given. The

evidence with reference to the ringing of the bell is conflicting. Some of the witnesses state that it was not ringing and others that it was. The train was running at the rate of from thirty to thirty-five miles per hour.

The appellant urges as a ground of reversal in this case two reasons. One is the giving of an erroneous instruction on behalf of appellee and the other is that the deceased was not in the exercise of due care for his own safety at the time he was injured. In the view that we take of this case it will not be necessary to consider the question as to the erroneous instruction as we are of the opinion that the case will have to be reversed because it does not appear from the evidence that the deceased was at the time of his injury in the exercise of due care for his own safety. It appears from this evidence that the day was clear and the deceased had an unobstructed view of the railroad track for the distance of from four hundred to six hundred feet west from the point where he was injured, that there were no other trains passing along the other railroad tracks or unusual noises of any kind, or nothing that we can see would in any manner tend to confuse the deceased and cause him to fail to look or listen for an approaching train as he attempted to cross the track, and he certainly did not look or listen for if he had he could have seen the train and avoided the injury. When he reached the south rail of the track he stopped and was standing there stooped over and after stopping did not move until he was struck by the train and two ordinary steps would have carried him beyond the reach of the train. There is nothing in the evidence showing

any reason why he should not have seen and heard this train approaching.

It is contended by counsel for appellee that it cannot be said as a matter of law that the deceased was negligent unless all minds would so pronounce it under the facts without hesitation or dissent, or that as a matter of law the deceased was bound to look and listen before approaching the crossing. We recognize that a failure to look to see if a train is approaching is not in law negligence per se but it may be negligence in fact if there are no conditions or circumstances which excuse the looking or listening. In this case our attention has not been called to a single circumstance that would have tended to excuse the deceased from looking and listening when he attempted to cross the track, and it is said in the case of *A. L. M. Co. vs. Watson*, 81 App., 142, after reviewing many of the authorities upon this question that, "These authorities, and many others that might be cited, warrant the statement that while a failure to look if a train is approaching is not in law negligence per se, it is negligence in fact, if there are no conditions or circumstances which excuse looking. And a jury, without evidence of conditions or circumstances which excuse looking, when looking would disclose the danger, is not warranted in finding that such failure to look is not negligence." One approaching a railroad crossing is bound to know that it is a place of danger, and to give that attention to the sights and sounds warning of an approaching train that a man of ordinary caution, under like circumstances, would give.. If he shall permit himself to become absorbed

in thought about other matters, and in consequence, oblivious of his present surroundings, he will do so at his peril." O. R. & N. Ry. Co., vs. Nelson, 100 Cal., 246.

While a court of appeals should be careful in disturbing verdicts for want of due care upon the part of the person injured, yet when it appears from the evidence that there are no circumstances or surroundings of any kind that would excuse the looking or listening and that to have looked or listened the injury could have been avoided, we feel constrained to hold that a failure to look or listen under such conditions shows a want of due care and believe that all reasonable minds would concur in saying that under the conditions here shown that the deceased was not using due care for his own safety.

We are of the opinion that the deceased was not in the exercise of due care; that his mind was probably absorbed in other matters and was oblivious to the conditions surrounding him and the dangerous position in which he had placed himself but this would not excuse him from exercising due care, and as he did not do so we are of the opinion that the judgment should be reversed without remanding.

JUDGMENT REVERSED.

Not to be reported in full.

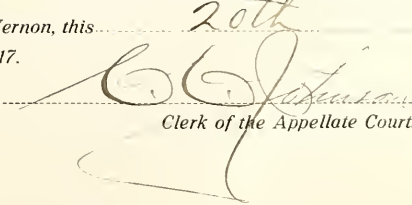
FINDING OF FACTS.

We find, as a statement of facts in this case, that the deceased at the time he was struck by the electric train was not in the exercise of due care for his own safety.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court

at Mt. Vernon, this 20th day of April,
A. D. 1917.


Clerk of the Appellate Court.

Opinion of the Appellate Court

AT AN APPELLATE COURT, begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March, in the year of our Lord, one thousand nine hundred and seventeen, the same being the 27th day of March, in the year of our Lord, one thousand nine hundred and seventeen.

Present:

Hon. James C. McBride, Presiding Justice:

Hon. Franklin H. Boggs, Justice.

Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the Thirteenth day of April, A. D. 1917, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

206 I.A. 114

Katie Hatzenbuehler, Admx.,

Appellee

ERROR TO
APPEAL FROM

vs.

Circuit COURT

No. 36.

October Term, 1916.

Illinois Central Railroad Co.,

Appellant

St. Clair COUNTY

TRIAL JUDGE

HON.

GEORGE A. CROW



Agenda No. 37

October Term, 1910.

Appeal from the Circuit
Court of St. Clair County

The injury complained of occurred at the intersection of Jackson and 10th Streets in the City of Belleville, Illinois, on the 31st day of March 1914, at the hour of about 10:30 at night. Jackson Street extends north and south and parallel to and west of that is High^{St.} and west of that is Illinois Street. Church Street is one block east of Jackson Street. 8th, 9th and 10th streets extend east and west; eighth being the most northerly of said streets. The Illinois Central Railroad passes through this part of Belleville in a north westerly and south easterly direction, crosses Illinois Street at or near its intersection, with a line extended west from the termination of 8th Street. The railroad passes in a southeasterly direction and crosses High street near the intersection of this street with Ninth Street, and crosses Jackson and Tenth Streets at the intersection of these two streets, and then extends in a southeasterly direction to

Church Street. The name of the deceased was Thomas Katzen-
buchler; he was the husband of a widow and lived upon Church
Street near its intersection with said railroad. He re-
ceased had been spending the evening at Paul's Leubart's
saloon which was located in the south east corner of the
block of ground that lies north of Tenth Street and west of
Jackson Street. The south side of the building being at or
about the north line of Tenth Street, and the east line of
the building was located on or about the west line of Jack-
son Street. There were two entrances for customers to this
building, one at or near the south east corner thereof, and
the other at or near the northeast corner; one of which was
used as an entrance from tenth street and the other from Jack-
son street. On the evening in question the deceased had left
the saloon to go to his home and after passing out to the
south side thereof he met Victor Christmann who came from
the north on Jackson Street, and he and the deceased stood
there and talked for about ten minutes, as Christmann says,
and then separated and Christmann went in to this saloon,
entering the same at the north east corner thereof and the
deceased started on his way home, which was to the south
east. This was the last that was seen of the deceased be-
fore he was injured. It appears that the distance from the
point where Christmann left deceased to the point where the
railroad tracks pass off of Tenth Street was about seventy-
five feet and that it was in the neighborhood of twenty-five
feet to the northeast entrance of the saloon. Joseph Schmidt
was passing along the railroad within a short time after the
deceased had left Christmann and discovered the body of the

deceased on the railroad about midway between Church and Jackson Streets. A little to the north west of this was found the hat, and spectacles of the deceased, and later on pieces of flesh were discovered along the railroad between the point where he was found and Jackson Street, and a piece of cloth of the width of about three inches and of the length of about nine inches that was identified by the witnesses as being part of the pants of the deceased was found fastened to a projection on the railroad on Jackson Street. A few minutes before the deceased was found a freight train had passed along this road from the north west to the south east. The depot was located at or near the crossing of Illinois Street and was about seven hundred feet from the saloon in question. The testimony of witnesses with reference to the speed of the train varied from four to twelve miles per hour and there was also a conflict in the testimony as to the ringing of the bell upon the engine. The engine had a tolerably fine head light, as some of the witnesses describe it. The witnesses differ in their testimony as to the condition of the weather but the preponderance of the evidence shows that it was cloudy. It also appears from the evidence that there were no obstructions to prevent a person from seeing a train at the depot a distance of about seven hundred feet away, if the light was sufficient. The appellee also introduced in evidence an ordinance of the city of Belleville prohibiting freight trains from running at a greater rate of speed than six miles per hour and also requiring all railroad companies operating their railroad within the city to keep the bell continuously ringing while moving the train.

The first thing I noticed when I stepped out of the car was the cold. It was a sharp, biting cold that seemed to penetrate my coat. I shivered as I walked towards the entrance of the building. The air was thick with the scent of old wood and the faint, distant smell of coffee. I had heard that the office was old, but I didn't realize how old it would be. The building was a grand, multi-story structure with a facade of dark stone and ornate carvings. The entrance was a large, arched doorway with a heavy wooden door. I pushed the door open and stepped inside. The interior was dimly lit, with the light coming from a few small, round lamps hanging from the ceiling. The walls were covered in dark wood paneling, and the floor was made of polished stone tiles. I walked down a long, narrow hallway. The walls were lined with bookshelves filled with old, leather-bound books. The air was still and quiet, with only the sound of my footsteps echoing in the distance. I reached the end of the hallway and turned right. The door was slightly ajar, and I pushed it open. The room was large and empty, with a high ceiling and a large, round chandelier hanging from the center. The walls were covered in the same dark wood paneling as the hallway. In the center of the room was a large, round table with a white tablecloth. On the table were several small, round objects that looked like buttons or coins. I walked towards the table and picked up one of the objects. It was a small, round, silver button with a single hole in the center. I held it up to the light and examined it closely. The button was old and worn, with a patina of age. I looked up at the ceiling and saw a small, round object hanging from the chandelier. It was a small, round, silver object that looked like a button or a coin. I reached up and touched it. It was cold and smooth, with a single hole in the center. I looked down at the button in my hand and then back up at the object on the ceiling. They were identical. I felt a strange sense of unease. I had never seen anything like this before. I walked back to the door and opened it. The hallway was empty. I walked back to the car and got in. The car was old and worn, with a steering wheel that felt like it was made of wood. I started the engine and drove away. The cold was still there, but it was a little less sharp now. I had a feeling that I had just stepped into a very old, very strange world.

It is contended by counsel for appellant that the evidence does not show the appellant to have been negligent. That the deceased was not injured upon the crossing of the highways, that the deceased was not in the exercise of due care for his own safety and that the court erred in refusing certain instructions offered by appellant. Upon the question of the negligence of appellant and the place where the deceased was injured the testimony was quite conflicting but the evidence of appellee if taken alone was sufficient to show that the appellant was running its train at a greater rate of speed than that permitted by the ordinance, and that it was not ringing the bell upon the engine as required by the ordinance to be done. While it is true that the body was found off of the crossing of Jackson Street and about midway between Jackson and Church Streets, yet there was evidence tending to show that the hat and spectacles were discovered to be near Jackson Street; that there were pieces of flesh found along the railroad even up as far as the street and that a piece of cloth that was identified as being a portion of the pants of the deceased was found fastened to a portion of the railroad track on the crossing of the highway. Some witnesses also testified that a piece of flesh of the deceased was found at or near the highway; so that the evidence introduced by appellee was sufficient to warrant the jury in finding that the deceased was struck by the train upon the public street. It is well settled by the decisions of this and other courts that although the evidence may be conflicting, if the evidence of the plaintiff is sufficient to warrant the jury in finding

THE UNITED STATES OF AMERICA

DEPARTMENT OF COMMERCE

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that the defendant was negligent or that the injury occurred at the crossing of the street, and such was not manifestly against the weight of the evidence, we would have no right to disturb the verdict on that account.

The next contention of appellant is that the deceased was not in the exercise of due care for his own safety. This was a question of vital importance in this case and before the appellee could recover it was her duty to show that the deceased was in the exercise of due care for his own safety. Toledo, St.L. & W.N. Co. vs. Gallagher, 100 App., 67. Newell, admx., etc., vs. C.C.C. & St. L. Co., 281 Ill., 505. There was no eye witness to this injury and no one to tell whether or not from personal observation the deceased was in the exercise of due care for his safety at the time of the injury. Counsel recognizing that it was necessary for appellee to prove such care and sought to supply this want of evidence by evidence of two persons who had known deceased for some time, had associated with him, and stated that he was a careful man, valued his life highly, and that it was his custom to look out for trains before crossing railroad tracks, and this, under the law, created a presumption, if not rebutted, that the deceased was in the exercise of due care. The appellant, however, contends that this presumption was overcome and that the question of deceased having exercised due care at the time was manifestly against the weight of the evidence. In order to determine this question it is necessary to ascertain what were the actions of the deceased in approaching or passing on to this railroad. It devolved upon him in attempting to pass upon the railroad to

ascertain if there were any trains approaching. Kennedy vs. Alton, G. & St.L.Trac.Co. 180 App.146. "One approaching a railroad crossing, is bound to keep that it is a place of danger and he must give that attention to the sights and sounds warning of an approaching train that a man of ordinary caution, under like circumstances, would give. If he shall permit himself to become absorbed in thought about other matters, and, in consequence, oblivious of his present surroundings, he will do so at his peril". G. & St.L.Tr.Co., vs. Nelson, 133 Ill., 248.

It appears from the evidence in this case that just before the deceased was injured he had been engaged in a conversation with Christmann on the street and that when they separated Christmann went north about twenty-five feet and in going north he saw the headlight and heard this freight train coming, and the deceased went south east towards his home. Two other witnesses, one of whom was a witness for appellee, testified that they were in the saloon and heard the train blow its whistle up at the depot and heard the train coming before it reached Jackson Street and that they were attracted by the noise of the train and went to the window to see it pass by. Two other witnesses, Joseph Koesch and Amanda Christmann saw the train coming between High and Jackson Streets and they went across the track in front of the train and passed in to the saloon. Other witnesses testified to having heard the noise of the train. It also appeared from the testimony of Oswald and other witnesses that on standing near the track, if the conditions were favorable, you could see up the track to the north west as far

as the depot, being a distance of about seven hundred feet. It is true that it appears from the evidence that the night in question was dark but it also appears that there was a reasonably fine head-light upon the engine and if the night was dark the light upon the engine would show the brighter, and so far as the evidence shows the deceased was possessed of his faculties of seeing and hearing and it looks to us to be unreasonable to suppose that he could not see the train and hear it, if he had exercised due care for his own safety. There is nothing so far as we can see in this evidence that excused the deceased from looking and listening before passing upon the track, and undoubtedly if he had looked and listened he could have seen this train and heard the noise, and this being true his failure to look and listen was negligence. - v. N.Y. Co. vs. Dunleavy, 129 Ill., 183. Kennedy vs. Alton, Granite City & St. J. Traction Co. (supra). There was nothing to distract his attention, such as the passing of another train or other noises, nor anything of that kind, so that it seems to us that under the law he was guilty of such contributory negligence as would prevent a recovery in this case. Gibbons vs. A. & C. M. & C. Co., 263 Ill. 265. It may be true that this court cannot say as a matter of law that the deceased was guilty of negligence in not looking or listening but where the only evidence of due care introduced is as to the facts of the deceased, and the facts and circumstances proven show that the deceased could have seen and heard the approaching train, and did not do it, that this was certainly sufficient to overcome the testimony of the

presumption created by the habits of the deceased, and we are of the opinion that the verdict of the jury upon this question, which was a material one and necessary to be proven by plaintiff, was manifestly against the weight of the evidence, and that the verdict of the jury is wrong and cannot be sustained.

The judgment of the lower court is reversed and the cause remanded.

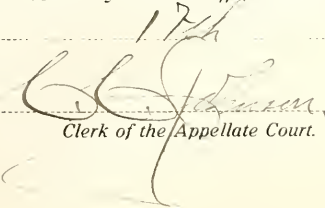
REVEREND AND HONORABLE.

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court

at Mt. Vernon, this..... 17th day of April.
A. D. 1917.


Clerk of the Appellate Court.

NOIN

3082

Opinion of the Appellate Court

AT AN APPELLATE COURT, begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March, in the year of our Lord, one thousand nine hundred and seventeen, the same being the 27th day of March, in the year of our Lord, one thousand nine hundred and seventeen.

Present:

Hon. James C. McBride, Presiding Justice.

Hon. Franklin H. Boggs, Justice.

Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the Thirteenth day of April, A. D. 1917, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

W.A. Miller and Louise E. Miller,

Appellants

vs.

No. 42

October Term, 1916.

George C. Lindemann, Guardian,

Appellee

206 I.A. 130

ERROR TO
APPEAL FROM

Circuit

COURT

St. Clair

COUNTY

TRIAL JUDGE

HON.

GEORGE A. CROW



Term No. 42.

In the Appellate Court,
Fourth District.

Grade No. 22

October Term, 1916.

In the matter of F. A. Miller and
Louise M. Miller,
Appellants.

vs.

George C. Lindemann, Guardian of the
estate of Ida L. Lindemann, Helen L.
Lindemann and Lloyd C. Lindemann, minors,
Appellees.

)
)
) Appeal from the
) Circuit Court of
) St. Clair County,
) Illinois.
)

McBride, P. J.

On August 23, 1910, appellant filed in the Probate Court of St. Clair County a petition alleging that the appellant, Louise M. Miller was the widow of Conrad Lindemann, and mother of Ida, Helen and Lloyd C. Lindemann. That Conrad Lindemann died October 25, 1911, in St. Clair County, Illinois and left surviving him, Louise his widow, and three minor children. That he left an estate to the minor children approximating fourteen thousand dollars. That on April 17, 1912, George C. Lindemann was appointed guardian of said minor and on June 25, 1913 the petitioners F. A. Miller and Louise M. Lindemann were married. The petition also alleges that prior to the marriage the petitioners agreed among themselves that F. A. Miller would not assume the relation of parent to the minor children and would not become liable for the board, etc., but that the same would be provided out of the income of their respective estates and that they should

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remain in the custody of their mother. That shortly after the marriage, petitioners notified the guardian that they desired to be paid out of the income of said minors for their board, clothing, etc., and that they had expended from June 1, 1913 to June 1, 1914, for Ida \$132.41, for Helen \$128.60 and for Lloyd \$111.30, and that these expenditures were fair and reasonable. That since June 1, 1914 to the filing of this petition they have had the custody and control of said minors and supplied them with board, clothing, etc., according to their station in life and that said care was reasonably worth two dollars per week each or a total of \$708.30 to July 1st, 1915, and prays an order directing the guardian to pay petitioners the sum of \$708.30 out of the income of said minors, to July 1, 1915, and that said guardian be further directed to pay out of the respective incomes of said children for the year ending July 1st, 1916, two dollars per week each, payable monthly, quarterly or as the court may see proper. This petition was heard by the Probate Court and the prayer thereof denied, from which an appeal was prosecuted to the Circuit Court of St. Clair County where it was again heard and refused by the Circuit Court. To reverse which order the appellants prosecute this appeal.

It appears from this record that C. F. Lindemann died in October, 1911, and left appellant, Louise Miller (nee Lindemann) his widow, and three children, Ida, Helen and Lloyd. Lloyd was of the age of one year, Helen two and Ida four or five years. That Louise Miller has kept the children since his death. It also appears that he left an estate to these minor children of about thirteen thousand

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dollars which the guardian has loaned and has been receiving an income therefrom of about six per cent per annum. It further appears from the evidence that upon the intermarriage of the petitioners they commenced keeping house and took the three minor children into their home and cared for them. They lived a while in Webster Grove and moved from there to Bryant, Arkansas, and then moved to East St. Louis and have since lived there and in the vicinity thereof. It further appears that while they lived at Bryant, Arkansas, the appellant Mr. A. Miller wrote a letter to the appellee, guardian, in which he stated, "We are going to move to Mammoth Springs, Arkansas, where they have a graded school for the children and to get along we must have some allowance until I can get this money paid any way. Now, George, we do not want any trouble or expense but must have some allowance as she is allowed by law. It does not matter where she is at or who she is married to..... If it must go to law she will claim all the law and you agreed to give". The money referred to that he desired allowance until it could be paid was as we would infer from the letter an investment that they had made in some lands. There was some evidence introduced, consisting of witnesses who were neighbors that knew Mr. and Mrs. Miller from November 14 to May 15, and others since June 15, who said that they had visited the home and saw how the children were cared for and it was reasonably worth from two to four dollars per week for each child, but these witnesses had apparently no knowledge of who furnished the clothing or provisions in caring for the children but seemed to presume it was done by the petitioners.

Louise Miller and W. A. Miller were also offered as witnesses but their testimony was objected to but was heard by the court subject to the objection. The appellee was defending as guardian in this matter and we are of the opinion that they were not competent witnesses.

It is insisted by appellant that the petitioners prior to their marriage had an understanding and agreement that the petitioner Wm. A. Miller would not assume the relation of father to these children but they would be supported out of the income of their part of their father's estate. We have read the abstract carefully and find no testimony in this record to support that statement. On the trial of the case the appellee was placed upon the witness stand by appellants and he stated positively that no arrangements of any kind had ever been made with him about contributing to the support of these children or that he had ever had any agreement with Mr. Miller. The itemized account of appellants claim is shown in the record to consist of provisions for the respective children, shoes, medical attendance, dresses and underwear and other apparently reasonable expenses but there is no testimony in the record showing who furnished these or under what conditions they were furnished or who paid for them or anything about it, just the bare claim presented as an exhibit.

The question arises in this case as to whether or not the appellants can recover from the guardian for moneys expended by them in the support of these children without first having obtained from the court an order to do so. Under the law the guardian is permitted to expend from the income

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of his ward's property such amount as may be necessary and proper for the suitable support of the ward but this must be determined, as we take it, by the guardian or by the court having charge of the fund. It appears from the petition and circumstances in this case that the minors have an income of about seven hundred dollars a year, and the property shown to be owned and possessed by the mother is not very great, and it would look as if such part of the income as was necessary for the support of these children should be used in that way, and if proper application was made to the court doubtless an order could be secured directing the guardian to contribute to the support of the children, if such guardian was unwilling to do so without an order. It appears, however, that the appellant Miller upon marriage to Louise became the head of the family and took these children into his family and cared for them and as we understand the law so long as he did so he could not recover from the guardian for their support and maintenance but if he desires to sever his relation with these children as parent he certainly has the right to do so, and in so doing he should notify the guardian of his refusal to longer keep the children without compensation and then if the guardian neglected to provide a place for them or make a contract in regard to compensation he would be entitled to recover reasonable pay for the keeping after such notice. In the case of Meyer vs. Teame, guardian, etc., 72 Ill., 577, the court says, "If on the other hand, in the first instance, he assumed the relation of father to the children, without any contract or understand-

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ing that he should be paid, while he can not recover pay while they were thus kept, yet, there being no legal duty or liability resting upon appellant to keep them any longer than he saw proper, if at any time he had a contract with the guardian in regard to the keeping, this was competent evidence to go to the jury, to show appellant's relation as father towards them had ceased. Or, if at any time, appellant refused longer to keep the children without compensation, and so notified their guardian, and the guardian neglected or refused to provide a place for them, or make a contract with appellant in regard to compensation, then he would be entitled to recover reasonable pay for the keeping after such notice, after deducting the value of their services".

It appears to us from this record that the appellant, Miller, in the first instance assumed the relation of parent to these children and it is not claimed that any notice was given of his refusal to longer keep the children without compensation. It is true a letter was written by Miller on behalf of the wife and children while they lived in Arkansas, to appellees, but this letter was merely a request to assist them for the time being and not a notice of a refusal to keep the children longer without compensation. The evidence offered by appellants in this case was very meager and we do not believe that the court would have been justified in allowing the appellants' claims. While it appears to be inequitable to require the appellant Miller, who is evidently not receiving any benefit from the labor of these children, to support them and maintain them yet the courts have no

power to allow him for such expenditures out of the minors' fund, except it be in accordance with the law and the approval of those who have control of the fund.

We are of the opinion that the court did not err in refusing to allow this claim, and the judgment of the Circuit Court is affirmed.

JUDGMENT AFFIRMED.

Not to be reported in full.

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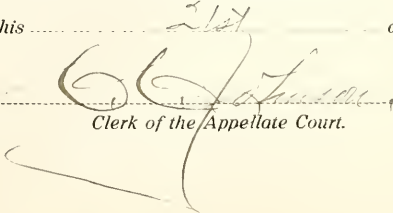
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I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court

at Mt. Vernon, this 21st day of April,
A. D. 1917.


Clerk of the Appellate Court.

NOINIC

3187)

AT AN APPELLATE COURT, begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March, in the year of our Lord, one thousand nine hundred and seventeen, the same being the 27th day of March, in the year of our Lord, one thousand nine hundred and seventeen.

Hon. James C. McBride, Presiding Justice.

Hon. Franklin H. Boggs, Justice.

Hon. Harry Hiebee, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the Thirteenth day of April, A. D. 1917, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

Charles W. Young.

Appellee

vs.

No. 48

October Term, 1916.

Abner C. Barr.

Appellant

206 I.A. 139

ERROR TO
APPEAL FROM

City

COURT

Alien

COUNTY

TRIAL JUDGE

HON.

J. E. DUNNEGAN

Term No. 48.

In the Appellate Court

Amenda No. 16

Fourth District.

October Term, 1916.

Charles E. Young,
Appellee.

vs.

Atner C. Barr,
Appellant.

}
} Appeal from the City Court of Alton.
}

McBride, P. J.

This was an action of assumpsit brought by appellee to recover from appellant for services rendered by appellee in effecting sales of certain lands owned by appellant in Florida. A trial was had by a jury and a verdict rendered in favor of appellee for \$250.00, upon which verdict the court rendered judgment and this appeal is prosecuted to reverse the judgment.

It appears from the record in this case that appellant was the owner of a large body of land in Lee County, Florida, which he had laid off in tracts of ten acres each and was engaged in selling the same. The appellee was an experienced real estate man living at Alton, Illinois, and had prior to that time been engaged in the selling of other Florida lands and appellant employed appellee to assist in the sale of the above mentioned lands. The appellant was selling these tracts of lands at three hundred dollars each. It is claimed by appellee that he had a contract with appellant that appellant would give him one hundred dollars for all sales made to persons whom appellee interested in the

lands and that he was to have a commission if he interested the party and a sale was effected, whether the sale was closed by him or by appellant. The appellee claims that he interested himself in procuring purchasers for the lands of appellant and that he had interested C. J. Seagraves, M. M. Schultz and Albert Gerson in appellant's lands and as a result thereof each of said parties purchased a tract of said lands for three hundred dollars each. The appellant does not deny that appellee was the procuring cause for the sale of the tract of land to C. J. Seagraves and claims that he has made a payment to appellee of fifty dollars upon this sale and ready and willing to pay the balance and tendered the same in court. Appellant, however, denies that appellee was in any manner the procuring cause of the sale of the tracts to Schultz and Gerson.

The declaration in this case charges that appellee caused the said Schultz, Gerson and Seagraves to become interested in said lands and that by reason of appellee's solicitations they became purchasers, and then avers that there was due him as commission upon said sales two hundred fifty dollars.

The evidence is very conflicting in this case as to the sales to Gerson and Schultz, and there is no question of law raised or argued by appellants but the whole case is submitted to this court upon the question of fact as to whether or not the appellee caused these purchasers to become interested in and as a result of such interest a sale was effected. It appears from the evidence of appellee that as to the sale made to Gerson that he had a conversation with

Gerson with reference to these lands and that he procured Seagraves, a neighbor of his, to assist him in effecting a sale to Gerson, which he did, and that he paid Seagraves for this service; that he explained to appellant his conversation with Gerson and the arrangement that he had effected with Seagraves and that appellant upon the order of appellee paid Seagraves for the services rendered, and charged them to appellee's account. It is true that Gerson denies that appellee caused or influenced him to purchase these lands but admits that he had a talk with him about some lands in Florida but did not remember and did not know whether it was the lands of appellant or not. The appellant claims that these commissions were paid to Seagraves for having interested other purchasers, being the Wagners, in the buying of other of these tracts of lands but Seagraves and appellee both testify that it was for services rendered in effecting the sale to Gerson. There is also a conflict in the evidence with reference to the sale to Shultz. The appellee testifies that he had a conversation with Shultz in 1910 with reference to the lands of appellant and that Shultz promised him that he would go and look at the lands and that afterwards he assisted Shultz in securing a ticket to go and see the lands, and while Shultz denies that appellee was the procuring cause for his purchase of the lands and says that he did not think he promised appellee that he would go and examine the lands, but was not sure about this but concedes that he called appellee over the telephone with reference to the procuring of a twenty-five day ticket for a trip to Florida, at which time he visited these lands.

While there are sale circumstances that were developed upon the trial of this case that tended to corroborate appellant in his testimony and theory that these sales were not effected or the purchasers interested by reason of the efforts of appellee, yet they were not of such moment as to make appellant's testimony and theory of the case conclusive, so that when all is considered it resolves itself in to a question of fact pure and simple.

If the jury believed appellee and his witnesses they were justified in finding a verdict for appellee, and if they had believed appellant and his witnesses they would then have been justified in finding a verdict for appellant. The law is well settled in this state that unless the verdict is manifestly against the weight of the evidence a court of appeals has no right or power to disturb the verdict, and we are unable to say in this case that the verdict is manifestly against the weight of the evidence, and the judgment of the lower court is affirmed.

JUDGMENT AFFIRMED.

Not to be reported in full.

While these are some considerations, they are not the only ones. It is also true that the law is not always clear, and that the courts are not always in agreement. In such cases, the law is often interpreted in a way that is most favorable to the party who is in the best position to bear the burden of the law. This is a principle of law that is well known to all who study the law, and it is a principle that is often applied in the courts. It is a principle that is based on the fact that the law is not always clear, and that the courts are not always in agreement. In such cases, the law is often interpreted in a way that is most favorable to the party who is in the best position to bear the burden of the law.

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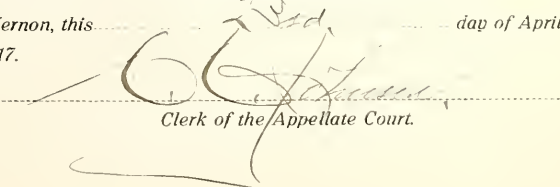
Conclusion

It is also true that the law is not always clear, and that the courts are not always in agreement. In such cases, the law is often interpreted in a way that is most favorable to the party who is in the best position to bear the burden of the law.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court

at Mt. Vernon, this 22nd day of April,
A. D. 1917.


Clerk of the Appellate Court.

NOINIC

387

Opinion of the Appellate Court

AT AN APPELLATE COURT, begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March, in the year of our Lord, one thousand nine hundred and seventeen, the same being the 27th day of March, in the year of our Lord, one thousand nine hundred and seventeen.

Present:

- Hon. James C. McBride, Presiding Justice.
- Hon. Franklin H. Boggs, Justice.
- Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the Thirteenth day of April, A. D. 1917, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

206 I.A. 155

City of Alton,
Appellant

ERROR TO
APPEAL FROM

vs.
No. 65.
October Term, 1916.

Circuit COURT

George Liller,
Appellee

Ladison COUNTY

TRIAL JUDGE

HON. GEORGE A. CROW

Term No. 65.

Appellate Court

Volume No. 76

Fourth District.

October Term, A.D.1916.

City of Alton,)
Appellant.)

vs.)

George Miller,)
Appellee.)

Appeal from the Circuit Court
of Madison County.

McBride, F. J.

Appellee George Miller is the owner of certain property in the City of Alton, located at the southwest corner of Second and Oak Streets, improved with a two story brick building, fronting on Second Street. Appellee erected his building in the latter part of 1908. It appears from the evidence that prior to the time appellee began the construction of his building, appellant had by ordinance established a grade for Second Street, and the grade of that street, as established, at its intersection with Oak Street was 20.2 feet above the bench mark used in the establishment of City Grades, the elevation above given being .2 foot above the top of the curb then in place along said street.

It also appears from the evidence that before appellee commenced building, he applied to the City Engineer of Appellant to point out and fix the grade required for a sidewalk in front of the premises. The engineer went to the premises with his instruments, and fixed the grade as requested.

ted, and for reference, marked the grade with a stake set in the ground. The engineer testified that he took the top of the curb of the paving in front of the property, as the grade, and from the ordinances introduced in evidence, this seems to have been the proper grade. It also appears from another ordinance introduced in evidence that an ordinance had provided a penalty for any failure to construct a sidewalk to grade, where a grade had been fixed, or where no grade had been established by ordinance, without having a grade established by the City Engineer.

Appellee then proceeded to improve his property by erecting a building thereon, and after the building had been erected, constructed a sidewalk in front thereof, on second street. This sidewalk after completion was inspected and accepted by the City Engineer of Appellant, and he testified at the trial that it had been constructed at the grade given. It appears from the evidence that after the building and sidewalk were both completed, the top of the sill in the front of the building was from an inch and a half to three inches above the surface of the sidewalk adjacent to the building.

It further appears from the evidence that in 1913 by a certain local improvement ordinance appellant provided for the construction of a new sidewalk in front of appellee's premises and other property, and thereafter, by proceedings had in the City Court of the City of Alton, a special tax was levied to pay the cost of constructing such sidewalks. Afterwards, the sidewalks were constructed, accepted by the City, and such acceptance duly confirmed in the City Court.

It is claimed that appellee was a party to said special tax proceedings; that he was notified as required by law of said proceedings, and the various steps therein, and that his property was taxed for the making of said improvement.

It further appeared from the local improvement ordinance that in front of appellee's premises, the grade of the proposed sidewalk at its outer edge was fixed at the top of the curb in the street, and from the curb to the inner edge of the walk, the grade raised one-fourth of an inch to the foot.

The evidence disclosed that when the sidewalk provided for in the local improvement ordinance was constructed, it lacked some five or six inches in casing up flush with appellee's building, and it also clearly appeared from the evidence that the top of the new sidewalk adjacent to appellee's building was approximately five feet above the floors of the vestibule, and other entrance leading into the building. Appellee claims that by reason thereof he has been damaged in the free and convenient access and communication, between his building and the street, and that the value of his premises are lessened and diminished; that by reason of the space between the inner edge of the new sidewalk and the building, and the height of the new walk above the old sidewalk, a trough is formed which catches the water from rains and storms, and diverts it into his basement, and on to the floor of his building; that the basements thereof the premises are rendered uninhabitable and unfit for habitation, and that the basement and foundation walls have been damaged and destroyed, and this suit was brought to recover the alleged damages.

To the declaration herein, appellant pleaded the general issue, and also five special pleas. Special pleas one and three are predicated upon the claim that the proceedings in the City Court of the City of Alton in connection with the petition and proceedings to levy the special tax for the construction of the sidewalk alleged to be the cause of appellee's damage, are res adjudicata, as to all questions of benefits accruing or damages occasioned to appellee by the construction of said sidewalk. Special pleas two, four and five set up the doctrine of estoppel, the pleas alleging in substance that appellee was a party to said special tax proceedings, duly notified as required by law, and that he had an opportunity to appear and that it was his duty to appear in said special tax proceedings and raise the issue as to any damages which would be occasioned to his property by the construction of said improvement; that the court in said proceedings had jurisdiction to hear and determine the question of such damages, and that appellee having failed to appear and raise such question, and the Court thereafter having found and adjudged that appellee would be benefited by the construction of said improvement, and having entered judgment in accordance with such findings, and said judgment being now in full force and effect, and no appeal being prosecuted therefrom, appellee is estopped to raise the question of damages in this case.

Appellee demurred to these special pleas, and his demurrer was sustained by the Court. Appellant elected to stand by its pleas, and assigns error upon the action of the Court in sustaining the demurrer.

The method or procedure for the levy of a special tax or special assessment to pay the cost of constructing a local improvement, where the making of such improvement will require that private property be taken or "damaged" in the construction thereof, is governed by Secs. 11 et seq. of the Local Improvement Act. After a due examination of the special pleas we are unable to find in any of them any proper allegations which charge that the provisions of the Local Improvement Act regulating the method of ascertaining compensation to be made for property taken or "damaged", were complied with in the proceedings had in the City Court of the City of Alton, for the levy and collection of a Special Tax for the sidewalk improvement, and upon which proceedings each of those special pleas are predicated.

In none of these special pleas is it alleged that the petition filed by applicant in the City Court of the City of Alton prayed that any steps be taken to ascertain the just compensation to be made for private property to be taken or "damaged" for such improvement, as required by Sec. 11 of the Local Improvement Act. Nor is it asserted in any of these pleas, that in such petition, applicant's premises were described as property which would be taken or "damaged" in making said improvement, or that upon the filing of such petition two competent and disinterested persons were appointed by the City Court to act with the Supervisor of Special Assessments, or with the President of the Board of Local Improvements for the purpose of investigating and reporting to the Court the just compensation to be made to the respective owners of private property taken or "damaged"

for said improvement, as required by Sec. 14 of said Act. Nor is it averred that any commissioners appointed as provided by said Sec. 14 made any report as required by Sec. 15 of said Act, or that any such report touching appellee's property was ever filed in the City Court of the City of Alton, certified as required by Sec. 16 of said Act, or that any summons was ever issued and served upon appellee as required by Sec. 20 of said Act, or that in any other respect appellant proceeded according to the provisions of the Local Improvement Act, for the purpose of ascertaining the compensation to be made for private property taken or "damaged" in the making of said improvement. These special pleas do not show that the issues involved in this action were ever properly before the City Court of the City of Alton, in the local improvement proceedings, and we are of the opinion that the demurrer to these special pleas was properly sustained.

It is next urged that the proofs do not support the allegations of the declaration in respect to certain ordinances or portions thereof referred to in the additional counts, and for the reason also that plaintiff predicates his right of recovery upon the proposition that after erecting his building and laying his walk, at the grade given by the City Engineer, the City tore up this walk, and built another at a different and higher grade, and appellant contends that the proof upon the latter proposition shows that the grade for the new walk, as provided by ordinance, was slightly lower, and not higher than the walk built by plaintiff. Upon the first proposition it may be true that

no ordinances of the character referred to in the additional counts were proven or introduced in evidence, but that cannot be material on this appeal, since that point could not apply to the original declaration, and it is not contended that the original declaration is not sufficient to sustain the judgment herein. Upon the second proposition, it may be true, as urged by counsel for appellant that the local improvement ordinance providing for the new sidewalk, did establish the grade thereof, slightly lower than the grade at which appellee claims he constructed his sidewalk, but the charge in the declaration is that appellant constructed the sidewalk, not at the grade established, or at the grade upon which appellee had constructed his sidewalk, but at a higher elevation. The evidence in the record fairly tends to support that charge.

There was evidence which fairly tended to show that before appellee erected his building or laid his wall, he applied to the City Engineer of appellant to point out the grade on Second Street, in front of his premises; that the City Engineer did this, placing a stake to indicate such grade; also that prior to this time, Second Street had been improved with a brick pavement, with curbing set along side thereof, and that the curbs in front of appellant's premises were set approximately at grade. Under such circumstances, The City having a permanent improvement in the street, in front of these premises, and having an ordinance which declared that the top of the curbs on such improvement was the grade at that place, and by the local improvement ordi-

nance having re-affirmed that grade as the grade for the new sidewalk, and appellant's engineer having indicated the top of the curb as the grade, at the instance of appellee, is estopped from claiming that the grade of the curb is not the proper grade in front of appellee's property. There was evidence tending to show that after appellee's walk was laid, it was inspected and accepted by the City Engineer, and he testified that it was at grade, and there was no evidence to which our attention has been directed, or which we have been able to discover, which indicates that the walk was below the top of the curbs which were declared to indicate the grade of the street at this place. There was also positive evidence in the record that this walk at the property line was some two or three inches below the nose of the iron sill across the front of appellee's building; also that the new walk constructed by the City was some five or six inches above the top of this iron sill. Even if it be conceded, that the new walk was by ordinance required to be constructed at the grade of the curb in front of appellee's premises, and that in fact it was constructed slightly lower than such grade, it is apparent, when we consider the physical conditions disclosed in the record, that some blunder was made, by some one as to the grade at the place in question. Either the grade furnished appellee by the City Engineer for his walk, and his building was too low, or the City, in constructing the new walk, set it above the proper grade, and which ever solution is the proper one, we cannot escape the fact that the city is liable for the condition thus created.

We do not think the court erred in excluding the evidence offered by appellant of the conversations between appellee and one Schwab, of which complaint is made. There was nothing in these conversations material to the issues in this case. Even if appellee did make the statements claimed, and did say that he thought the building had been constructed too low, this evidence has no tendency to show that he did not properly construct it in compliance with grade established by the City, and indicated to him by its engineer.

Appellant has assigned as error the action of the trial court in refusing to give certain instructions tendered by it. These instructions are nine, ten and eleven of appellant's refused instructions. We think instructions nine and ten were properly refused. Each of these instructions ignore that evidence in the case which tends to show that in determining the grade at which appellee would erect his building, appellee was governed by a grade indicated by the proper City Officers of Appellant. There was no error in refusing instruction No. eleven. This instruction related to the method of determining the damages. The same instruction had been given by the Court at the request of appellant, and there was no occasion to repeat the same proposition of law. While worded somewhat differently, the substance of instruction No. eleven is contained in the given instruction No. five.

It is finally urged that the damages awarded are excessive. The evidence tended to show that by reason of the construction of the new wall, the water built up against appellee's premises were depreciated; that water was thrown into the building, and into the basement, and that it was because the

building and walls to settle and crack. Witnesses familiar with the condition of the premises, both before and after the new walk was laid, were called and testified as to the differences in value before the new walk was laid, and afterwards. From their testimony, it would appear that the damages range between \$1500 and \$3000. The jury assessed the damages at \$1416, a sum slightly less than the lowest figure fixed by any witness testifying in the case. Under such circumstances it can hardly be said that in this respect the jury were actuated by passion and prejudice. It may be suggested here, that appellant did not controvert the claim of appellee as to the character of the injuries which had been inflicted upon him, or of their effect upon his building, nor did appellant call any witnesses to testify upon the question of depreciation in value, or to refute the valuations testified to by the witnesses called by appellee. Under such circumstances it cannot complain that the jury in fixing damages were governed by the only evidence before them upon that question.

We find no error in this record which would warrant a reversal of the judgment herein, and it is accordingly affirmed.

APPELLEE D.

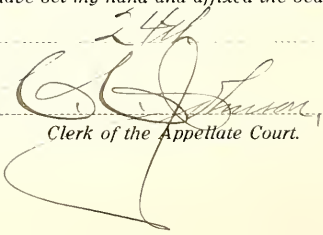
Not to be reported in full.

NOIN

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court

at M. Vernon, this 24th day of April,
A. D. 1917.


Clerk of the Appellate Court.

3185

Opinion of the Appellate Court

AT AN APPELLATE COURT, begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March, in the year of our Lord, one thousand nine hundred and seventeen, the same being the 27th day of March, in the year of our Lord, one thousand nine hundred and seventeen.

Present:

- Hon. James C. McBride, Presiding Justice.
- Hon. Franklin H. Boggs, Justice.
- Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the Thirteenth day of April, A. D. 1917, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an *OPINION* in the words and figures following:

206 I.A. 158

Elijah H. Marteeny et al,
Appellants

~~ERROR TO~~
APPEAL FROM

vs.

No. 66
October Term, 1916.

Circuit COURT

J. Warner Louth, as Commissioner
of Highways, etc.,
Appellees

Jefferson COUNTY

TRIAL JUDGE

HON. J. C. EAGLETON

Term No. 66.

In the Appellate Court,

Agenda No. 17

Fourth District.

October Term, 1916.

Abijah M. Marteeny, et al,
Appellants.

vs.

J. Warner Louth as Commissioner
of Highways of town of St. Vernon,
et al,
Appellees.

}
}
} Appeal from the Circuit
Court of Jefferson County.

McBride, J. J.

At the September Term, 1914, of the Circuit Court of Jefferson County, Illinois, a decree was rendered in the above entitled cause from which decree an appeal was prosecuted to this court, and an opinion filed by this court at the October Term, 1915 thereof reversing and remanding said cause. The opinion rendered by this court is aforesaid is hereby referred to for the facts and issues involved in the cause.

It appears from the record that the decree above referred to as having been appealed from and rendered on the 28th day of September 1914, contained among other things the following provisions: "It is further ordered that said J. Warner Louth shall not receive any pay for his own labor heretofore used in the construction of said highways, and that he is hereby ordered to restore and pay back to the Treasurer of the said town for the road and bridge fund all money or compensation that he, the said J. Warner Louth, may

heretofore have received for the use of his said term, within thirty days from this date". This finding was sustained by the decision of the Appellate Court but the cause was reversed and remanded for other reasons. This remanding order was filed in the Circuit Court to the April Term 1918, at which time appellants were given leave to file a supplemental bill making one Grant Irvin a party, who had been elected as successor to E. Delbert Wilkinson to the office of supervisor of the town of Mt. Vernon. A demurrer was sustained to this petition and leave given to amend the same, and in the amended petition the demurrer was overruled. After the demurrer had been overruled to the amended petition and while the case was still pending in the Circuit Court the appellants offered evidence to show the amount of money that had been received by J. Warner Louth, in violation of the decretal order of the Circuit Court, and to fix the amount, if any, due from the said Louth on account of the moneys so received by him but the court refused to permit the introduction of this evidence and on the 18th day of July 1918, rendered another and further decree in said cause upon the motion of appellees, which also provided, and that the said J. Warner Louth should not receive pay for his term as furnished to build the said highway; that the said commissioners of highways out of the proceeds of the sale of said lands shall pay for the work already done and materials used on the highways, except for the work done and materials furnished by the said J. Warner Louth". To the rendition of this decree the complainants excepted and now seek to reverse the same by this appeal.

The appellants in their argument say, "It will be observed that the decree appealed from follows the first decree in ordering said moneys restored to the town fund but finding no specific sum due. This is the whole and only question presented by this record". In the opinion of the Appellate Court heretofore referred to, sustaining the finding and decree of the Circuit Court requiring Louth to restore and pay back the moneys received by him but reversing and remanded the cause for other reasons but in reversing and remanding the case the court did not direct the chancellor to hear evidence and determine the amount that was due from Louth on account of the moneys so received by him.

The contention of appellants is that a money decree in order to have validity must be for a specific sum. Not to have fixed a specific sum to be paid by Louth would leave the matter subject to computation by some other person or body. The Circuit Court was the one vested with the power to determine this amount and could not transfer this to any other person. "The decree should have ascertained the precise amount that was required to be paid and not leave it to computation". Smith vs. Trimble et al, 27 Ill., 152. And again in the case of Hards vs. Burton, 79 Ill., 115, the court says, "The cases of Aldrich vs. Chas., 3 Conn. 21, Dewolf vs. Long, 2 Wilm. 679, and Smith vs. Trimble, 27 Ill. 152, all hold that it is the duty of the court to find the amount due, and not to leave it to others. The decree, in this respect, is fatally defective". It is well settled by the text books and other authorities that here it is

sought to obtain a money decree the amount must be fixed at a certain specific sum by the decree itself. One of the only points urged by appellants for a reversal of this decree. We believe that the Circuit Court committed an error in refusing to hear evidence and ascertain the amount of amount that Louth was liable to pay under the former finding of the court. The decree of the Circuit Court will be reversed and the cause remanded with directions to hear testimony and ascertain the amount of money that he has received or that had been unlawfully paid to him as determined by the decree of said court.

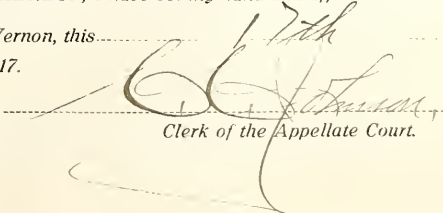
REVEREND AND HONORABLE JUSTICE OF THE COURT.

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court

at St. Vernon, this 17th day of April,
A. D. 1917.


Clerk of the Appellate Court.

NOINIC

3070

Opinion of the Appellate Court

AT AN APPELLATE COURT, begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March, in the year of our Lord, one thousand nine hundred and seventeen, the same being the 27th day of March, in the year of our Lord, one thousand nine hundred and seventeen.

Present:

Hon. James C. McBride, Presiding Justice.

Hon. Franklin H. Boggs, Justice.

Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the Thirteenth day of April, A. D. 1917, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

206 I.A. 164

Joe Baretti,

Appellee

ERROR TO
APPEAL FROM

vs.

No. 68.

Circuit

COURT

October Term, 1916.

Peter S. Theurer, Trustee etc.,

Appellants

Franklin

COUNTY

TRIAL JUDGE

HON.

CHARLES H. MILLER

Term No. 68.

In the Appellate Court,

January 19, 1916.

Fourth District.

October Term, 1916.

Joe Baratti,
Appellee.

vs.

Appeal from Circuit Court
Franklin County.

Peter C. Theurer, Trustee
and the Peter Schoenhofen Brewing
Company, a corporation,
Appellants.

McRide, T. J.

It appears from the record in this case that prior to January 11, 1915, the appellee Joe Baratti was engaged in the selling of beer and other liquors at East Frankfort, Illinois, and that the appellant Peter Schoenhofen Brewing Company was engaged in the brewing business and the sale of beer at Chicago, Illinois. That appellee had become indebted to appellant and for the purpose of securing the amount owing, the appellee upon the date aforesaid procured to appellant a bond in the amount of \$2500.00 and secured said bond by a mortgage upon lots three and four in block nine in the Blake-Harris Addition to the city of East Frankfort, and lot nine in block 2 in Peter Sartier's first addition, excepting the coal and mineral rights. The bond executed provided that if Joe Baratti shall sell and truly pay unto said Peter Schoenhofen Brewing Company all that he now owes to it for beer and empties heretofore sold and delivered and also

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all that he may hereafter be indebted for beer and maltice hereafter sold and delivered to him, then this obligation to be void. It further appears that the town of West Frankfort was dry territory, under the local option statute, but the appellant continued to ship and sell beer in the territory during practically all of the year 1915. The testimony tends to show that most, if not all, of the orders were forwarded to Chicago and therefilled by appellant by delivering the same to the railroad company for transportation. There is, however, some dispute as to whether or not the beer was sold to appellee at West Frankfort. At the February Term, 1917, of the Franklin County Circuit Court, the appellee filed a bill to set aside the mortgage or trust deed aforesaid, as a cloud upon the appellee's title, and for reasons and causes charged that the beer was sold by appellant to appellee in violation of the ordinance of the town of West Frankfort and the laws of the State of Illinois; and charges that whatever amount of money, if any, that may be due from appellee to appellant, was for intoxicating liquor sold in violation of said laws. Afterward by an amendment it was alleged as a further reason for the cancelling of said mortgage that the amount of indebtedness that the mortgage was made to secure has long since been paid and satisfied by the appellee.

The appellant filed an answer admitting the execution of the mortgage and deed aforesaid and stating that there was then due under the said deed \$241.00, and avers that the sales were made to appellee at and in the City of Chicago, State of Illinois, and denies that any sum of money due from appellee to appellant have been paid, — alleged

in said bill. The appellant then filed a cross-bill setting to foreclose the said mortgage, setting up that the appellee was indebted to it in the said amount of \$203,127; that the money was due for beer sold by appellant to appellee and alleges that said beer was sold to appellee in the city of Chicago and that the sales were made and consummated at that place, and ask that the property described in said bill be sold to satisfy the amount due from appellee to appellant. The answer of appellee to appellants cross bill denies that there is now lawfully due the appellant the said amount claimed in the bill, or any part thereof, and denies that the liquors were sold to him at Chicago, but avows they were sold to him in West Frankfort, in violation of the laws of the State of Illinois. The cause was heard in open court and the court found that the liquors sold by appellant to appellee were sold to him in anti saloon territory and in violation of the local option law and that at the time the land was executed West Frankfort was anti saloon territory. The decree also finds that appellant has long since been paid any and all indebtedness that became due it from the said appellee for the sale of beer, and that by reason of the payment of all indebtedness due at the time of the execution of the bond, and all indebtedness that was therewith created that the mortgage became satisfied and was of no force or virtue.

It is claimed by counsel for appellant that the beer was sold and delivered to appellee in the city of Chicago, while counsel for appellee contends that it was sold and delivered to him at West Frankfort, and there are some circumstances tending to corroborate the theories of both

parties out nothing that appears to be contradictory. Many of the orders were made by telegram or letter and the beer shipped in pursuance to that but it also appears that the freight was paid by the appellants, that is, by deduction, it from the purchase price of the beer in the making of remittances. Counsel for appellant have made and argued several objections to the decree rendered by the Circuit Court and among them, and as we think, the controlling one is as to whether or not this indebtedness had been paid. If the legitimate indebtedness has been fully paid, so that the appellee was not indebted to appellant, then we can see no reason why the mortgage should not be satisfied. The parties upon the question of the amount of beer purchased, and the amount of payments made, and beer purchased, is very confused and is not presented in a manner, or the facts are not collected, either in the abstract or in the brief, as to enable this court to tell whether or not the chancellor who heard the testimony was correct in finding that the indebtedness of appellee had been fully paid, so that we are unable to say that such finding was manifestly against the weight of the evidence. The chancellor saw the witnesses, heard their testimony and doubtless made computations of the different classes of statements furnished upon the trial which were scattered as pointed out by counsel at the time so that the chancellor could understand them, and he has found that this indebtedness has been paid and we can see no reason for disturbing that finding. It is said by counsel for appellant that appellee was indebted to appellant to the extent at least of \$694.55 for a check that appellant gave and payment was re-

issued by the bank. This check was given on about the 15th day of January 1910, but we find by looking over the several checks that were paid that appellee paid appellant between three and four thousand dollars after the making of this check, and we can not say in view of these facts that the court was wrong in holding that this too had been paid.

It is also urged by appellant that its ledger sheet offered in evidence, showed a balance due on April 22, 1911, of \$1849.34 and that Mr. Moser, the agent of the Brewing Company, testified that at the time of the hearing that there was \$2217.00, but this witness also testifies that he did not keep the books or receive the orders and that the receipt given him was obtained from the books, and that he has no personal knowledge of the transactions and this statement could not have had much weight with the court.

It is also insisted that the leaves of the ledger book offered in evidence by appellant show that the amount of \$1849.34 was due. It appears from the evidence of the witnesses for appellant that these leaves were taken from the book keeping department of appellant; taken from the customers ledger with leaves fastened by binders but this witness says that he did not receive the orders or make any entry upon these ledger leaves. This testimony was objected to by counsel for appellant and the testimony heard subject to the objections, and the court must have determined upon the final hearing that there were not admissible as books of account. There is no testimony that this is a work of original entries, and that the entries were made thereon by the witnesses, or that the entries were true and just or that they were made by a deceased person or non-resident, or that

they were made in the usual course of business. It appears to us that testimony of this character can not be received for the purpose of proving books or account, under our present statute.

lastly, it is said that the trust deed should not be canceled because it was for the securing of a bond that was a continued obligation and covering sales that were to be made in the future. There is no time specified in the bond of the extent of sales that are to be covered by the bond but it seems to us that if the appellee had paid all that was due and did not desire to further continue business with the appellant that he was entitled to have his bond and trust deed discharged.

It appears to us that counsel for appellants in the preparation of their abstract and the presenting of the questions that they claimed to be involved in this case have neglected to classify and present the different classes of evidence in such a manner as to enable this court to see clearly the real condition of the several transactions between these parties. It appears to have been left to the court to go through the several items and segregate them, which we find it impossible to do owing to the manner in which the abstract is prepared and presented.

Under all the circumstances in this case we are not prepared to say that the finding and decree of the chancellor was manifestly against the weight of the evidence but as he has found that the indebtedness was paid and discharged we can see no reason for disturbing the decree upon the other grounds urged by appellant, even if otherwise valid, and the decree of the Circuit Court is affirmed.

18-10-10.

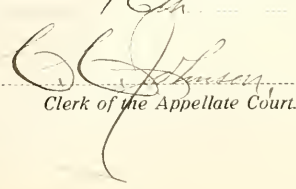
Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court

at Mt. Vernon, this...
A. D. 1917.

16th ... day of April,


Clerk of the Appellate Court.

PINION

neg 5091

Opinion of the Appellate Court

AT AN APPELLATE COURT, begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March, in the year of our Lord, one thousand nine hundred and seventeen, the same being the 27th day of March, in the year of our Lord, one thousand nine hundred and seventeen.

Present:

Hon. James C. McBride, Presiding Justice.

Hon. Franklin H. Boggs, Justice.

Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the Thirteenth day of April, A. D. 1917, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

Ldna Miranda,

Appellee

vs.

No. 69

October Term, 1916.

City of Collinsville,

Appellant

206 I.A. 166

ERROR TO
APPEAL FROM

Circuit

COURT

Madison

COUNTY

TRIAL JUDGE

HON.

GEORGE A. CROW

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Term No. 69.

In the Appellate Court,

Page No. 31

Fourth District.

October Term, 1918.

Edna Miranda,
Appellee. }

vs. }

City of Collinsville, }

Appellant. }

Appeal from the Circuit Court
of Madison County.

McBride, L. J.

This cause was heard by the court without a jury and judgment rendered in favor of the appellee for eighteen hundred dollars.

It is contended by counsel for appellant that the city of Collinsville was not guilty of negligence and that the appellee was not in the exercise of due care for her own safety. It appears from the evidence that Main Street in the city of Collinsville extends east and west through the city, and that the side walk where the injury occurred was on the south side of the street and the obstruction complained of was immediately in front of what is known as the Benfrow property. The appellee and her friend, Mrs. Guse, were traveling in a westerly direction along the side walk and at or near the Benfrow property met another lady traveling east. Appellee was on the outside and upon the meeting of this lady they turned out to allow her to pass by them and upon turning to the outer edge of the side walk appellee's foot struck some steel pipe located

in the outer edge of the side walk upon which she tripped and stepped in to a hole near by and fell and as a result of this fall received the injuries complained of. The pipes project up above the side walk the distance of about six inches and close to these pipes there was a hole of the depth of six or eight inches into which appellee fell when she tripped upon the pipes. The evidence shows that this side walk was constructed of brick and at the outer edge of the walk the brick were set at angles and extended slightly above the walk and that these pipes were standing immediately against the brick, forming the border, or in a line with it and constituted a part of the side walk, which was of the width of about five feet. The evidence of appellee tended to show that the pipes were located just outside of the walk but we think a preponderance of the evidence shows they were located as above indicated. The evidence tends to show there was an arc light within about two hundred feet but evidence of the witnesses for appellee tends to show that the place at which the injury occurred was not well lighted and they were not able to see objects very distinctly at this point. It appears from the evidence that appellee was at this time pregnant and as a result of her fall and injury had a miscarriage and suffered very greatly, was confined to her bed for some length of time and had not at the time of the trial recovered her normal health. It is not contended that the damages are excessive.

We do not believe that the court erred in holding that appellee was guilty of negligence and that appellee was in the exercise of due care at the time of her fall.

The side walk in question was upon one of the public streets of the city of Collinsville, and these pipes had been there several years, extending the distance of about six inches above the side walk, and we think the court was justified in finding that they were a menace to persons traveling over the walk and had existed for such a length of time that the city should have taken notice of it and remedied it. The very fact that as appellee and her companion were traveling along the walk in the usual manner of traveling and having met a lady at this point and attempted to turn out to allow her to pass and in doing so tripped and fell would justify the court in concluding that these pipes projecting so far above the walk were a menace to persons traveling thereon. In the case of the city of Taylorville vs. Stafford, 99 App., 418, the city permitted a "staub" to project two inches above the level of the walk and the plaintiff while passing along the walk in day time and used to the walk, tripped and fell upon this "staub" and the appellate court held that it was negligence in the city to permit this "staub" to project above the side walk as it did, and also held that although the plaintiff was acquainted with the walk, but had no acquaintance with this "staub", that she was in the exercise of due care. This case was appealed to the Supreme Court and there affirmed in the 196 Ill., 238. Many other similar cases have been sustained by our Courts as showing negligence. Even if the projection had been just outside of the walk as contended by Appellant we do not believe that this would excuse it for allowing the steel pipes to project above the level of the walk, as

they did, and in such close proximity to it. In the case of Brennan vs. City of Streator, 256 Ill., 468, where a valve box three and one-half inches in diameter and extending above the surface five inches and outside of the sidewalk, the court says it cannot be said as a matter of law that such obstruction is of such a character as to relieve the city of negligence in permitting it to remain in a position where it might become a menace to persons using the sidewalk with ordinary care. In the case of the City of Rock Island vs. Larkin, 136 App., 3579, the court held that a valve box located four inches south of the sidewalk and projecting five inches above the ground might be held to be negligence upon the part of the city; and in a number of other cases where, under conditions that are liable to arise, an object of this character might prove a menace to public travel, and that it is negligence to permit such objects to exist in the streets. In this case the steel pipes were permitted upon one of the main streets of the city, and one much traveled as indicated by the evidence.

It is also contended by counsel that appellee was not in the exercise of due care for her own safety. While it is true that the evidence shows that she had passed along this walk frequently, she had never observed the pipes in question and that she did not see them on this occasion, and the evidence tends to show that the light was not sufficient to permit her to see them. The walk was only of the width of five feet and while she and her companion were traveling along in the usual and ordinary mode of travel they met another lady and in turning out in order to give her

an opportunity to pass by them the appellee accidentally struck her foot against these pipes and fell, and the testimony is that she did not know the existence of these pipes and we are unable to say that under these conditions that appellee was not in the exercise of ordinary care for her own safety, and we are well satisfied with the finding of the court that she was in the exercise of due care for her own safety, and we think this doctrine is well sustained by the case of the City of Taylorville vs. Stafford, Supra. The court heard the testimony of the witnesses in open court and was better calculated to judge whether or not under the particular conditions that existed the appellant was negligent or that appellee was in the exercise of due care and unless the facts developed would show as a matter of law that such negligence or due care did not exist then we would have no right to disturb the finding of the court and we can not say as a matter of law that the appellant was not negligent or that the appellee was not in the exercise of due care for her own safety.

It is next insisted by counsel for appellant that notice of the time, place and circumstances of the injury was not served upon the proper person and therefore no right of action existed. The statute provides that when any person is about to bring an action against a city or village he must "file in the office of the city attorney, if there is a city attorney, and also in the office of the city clerk, a statement in writing signed by such person, etc." The Supreme Court, in the case of Donaldson vs. Village of Dieterich, 247 Ill. 522, in passing upon this statute says, "We are constrained to hold that the city or village attorney

referred to in section 2 of the act of 1905 must be a licensed attorney and must have an office or place of business where he can be found, and that in a case where a village has no regular village attorney who maintains an office, the service of the notice required by section 2 of the act of 1905 may be had upon the village clerk, by filing the same in his office." The evidence in this case shows that Edward C. Bardsley who had been elected city attorney for the city of Collinsville was not a licensed attorney and whether he maintained an office or not is not under this decision have been a licensed attorney in order to make such service good, otherwise the service must be upon the city clerk, and the evidence in this case shows that the notice was given to the city clerk. It is said, however, that the owner had been appointed to the office of assistant city attorney and that he was a licensed lawyer and for that reason the notice must be served upon him. This is purely a statutory proceeding and the statute does not provide for the service upon the assistant city attorney but it must be upon the city attorney, and under the decision of the Supreme Court he must be a licensed lawyer. We are of the opinion that the service of the notice in question was in accordance with the statute and decisions of the Supreme Court of this state.

No question is made and argued by counsel for appellant as to the amount of damages recovered.

We believe that the court was fully warranted in finding that appellant was negligent and that the appellee was in the exercise of due care for her own safety, so that we can see no reason for disturbing the findings of the court and therefore the judgment of the lower court is affirmed.

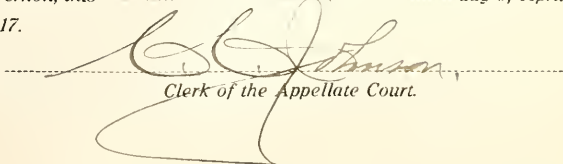
JUDGMENT AFFIRMED.

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court

at Mt. Vernon, this 24th day of April,
A. D. 1917.


Clerk of the Appellate Court.

NOIN

706 A. 116
3092

Opinion of the Appellate Court

AT AN APPELLATE COURT, begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March, in the year of our Lord, one thousand nine hundred and seventeen, the same being the 27th day of March, in the year of our Lord, one thousand nine hundred and seventeen.

Present:

Hon. James C. McBride, Presiding Justice.

Hon. Franklin H. Boggs, Justice.

Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the Thirteenth day of April, A. D. 1917, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

Village of Ina, Illinois,
by O. T. Shinn, a tax payer,
Appellant

vs.

No. 72

October Term, 1916.

F. F. Kelley,

Appellee

206 I.A. 168

ERROR TO
APPEAL FROM

County COURT

Jefferson COUNTY

TRIAL JUDGE

HON.

R. E. HICKMAN



Term No. 72. In the Appellate Court, Volume 20.42
Fourth District.
October Term, 1916.

Village of Ina, Illinois,	)	Appeal from the County Court of Jefferson County.
by C. T. Shinn, a tax payer,		
Appellant.)	
vs.		
R. F. Kelley,		
Appellee.)	

McRideo, P. J.

It appears from the stipulation and testimony contained in this record that the appellee R. F. Kelley was President of the Board of Trustees of the village of Ina. That said village had prohibited the sale of intoxicating liquors within its limits and that appellee had been apprised of the fact that some persons were engaged in the unlawful sale of liquors in said village. He sought to secure evidence to convict these violators of the law and to do so he employed T. Sullivan of the Chicago Detective Association to ferret out such violations and without first having procured an appropriation, and without the village board having authorized him so to do he issued orders to himself upon the village Treasury of said village and drew therefrom funds to the amount of \$122.53, and paid the same to Mr. Sullivan. It further appears that after the principal part of these orders had been drawn and on about the 1st of July, he presented his bill to the Board of trustees of said village for allowance but as he did not secure the votes of

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AS MAY BE NECESSARY TO BRING ABOUT THE
WIDEST POSSIBLE CIRCULATION OF THE BOOKS
OF THE LIBRARY IN THE MOST EFFICIENT MANNER
POSSIBLE. TO THIS END THE LIBRARY HAS
MADE SUCH ARRANGEMENTS AS MAY BE NECESSARY
TO BRING ABOUT THE WIDEST POSSIBLE
CIRCULATION OF THE BOOKS OF THE LIBRARY
IN THE MOST EFFICIENT MANNER POSSIBLE.

the majority of the board to vote for the allowance of said claim it was rejected. It is admitted by the appellee that he obtained this money from the village treasurer by reason of signing warrants upon the treasury and presenting the same for payment, which were paid. This suit is brought by O. J. Hinn, a tax payer, against Kelley to recover this money for the village under Section 178, chas. 24 of the Revised Statutes, which provides a suit may be brought by any tax payer in the name and for the benefit of the city or village, against any person or corporation to recover any money or property belonging to the city or village, or for any money which may have been paid, expended or released without authority of law. A trial was had in the County Court and judgment rendered against the appellant for costs, which it now seeks to reverse by this appeal.

The first question that arises in the consideration of this case is whether or not the money so received by appellee was paid to him without authority of law. He is convinced from the reading of this record that he had no authority whatever to secure this money from the village treasury. Section 41, provides that before any liability can be asserted against the village that such liability must be concurred in by a majority of all the members elected, and there must also have been an appropriation in the manner provided by statute before the money could be lawfully paid out of the treasury. Neither of these things was done. It is admitted that no appropriation had been made and no order given by the board of trustees authorizing the payment of the money. It is said if any liability existed at all that Sullivan was the man that finally received the money and the action should

have been against him. We do not think that the appellee could, by unlawful means, secure money from the village treasury and pay it to some one else and then excuse himself from such act by saying that they were the ones that were liable. The appellee is the one who obtained the money and it is immaterial what he did with it. If it was unlawfully obtained he is liable to refund it.

Appellee also contends that an action before a justice of the peace would not lie for the recovery of this money. When he obtained the money, whatever way have been the unlawful means by which he secured it, nevertheless the procuring of the money created a money liability, or debt, by him to the village and the justice of the peace had jurisdiction.

It further appears from the evidence in this case that there were two suits commenced by appellee against the appellant for the recovery of this money but it also appears that the parties to these suits were not wholly identical. There was a different party in the latter suit than in the former. The summons in the former suit was made returnable July 21, 1915, and the summons in this case was made returnable on July 23, 1915. Upon the date set for trial of the former suit the parties appeared and announced ready for trial. Whereupon, as appears from the docket of the justice of the peace the following order was entered, "On motion by attorney for defendant to dismiss the case for want of jurisdiction, motion sustained, cause dismissed and appeal prayed by plaintiff". It is not contended that the order entered by the justice of the peace dismissing that suit for want of jurisdiction is an adjudication of

of the rights between these parties and is a bar to a recovery by appellant herein. He also in his argument says that as this was commenced for a recovery of this money and as the suit was dismissed that the appellant is estopped from a recovery. If it is to be taken as a bar then it must appear that there is an identity of parties and of subject matter, and in speaking upon this subject the Supreme Court says, "It must be shown that the cause of action is the same in both proceedings, and in which, although the particular form of action may not be important, there must be, as between the two actions, identity of parties, of subject matter and cause of action". *Brack vs. Boyd*, 211 Ill., 293. Again it is said, "Where the former adjudication is relied upon as an absolute bar, there must be, as between the two actions, identity of parties, of subject matter and cause of action. There is, however, a clearly defined distinction between that class of cases and where some controlling fact or matter material to the determination of both causes have been adjudicated in a former proceeding in a court of competent jurisdiction, and the same fact or matter is again at issue between the same parties. In this latter case the adjudication of the fact or matter in the first suit will, if properly presented, be conclusive of the same question in the latter suit, irrespective of whether the cause of action is the same in both suits or not. This is generally denominated estoppel by verdict". *Markley vs. People*, 171 Ill., 221. The same doctrine is announced in the case of *the People vs. C.B. & M. Co.*, 247 Ill., 343. It is true that in an adjudication if the proceedings were such as that the matter may have been determined, and were not in fact determined, that

this under proper conditions would constitute a bar. In this case it is admitted that the parties are not identical, and it further appears from the record that the question here presented was not presented in the suit dismissed by the justice of the peace for want of jurisdiction. It appears from the authorities that to constitute a former adjudication there must have been a trial and a determination of the rights of the parties but no such thing occurred here. It will be observed that this order entered by the justice of the peace was before any trial was had, and upon the motion by the defendant to dismiss the suit for want of jurisdiction. We do not understand that a mere order dismissing a suit can either be plead in bar or in estoppel. It has been said by the Supreme Court, in speaking of a dismissal of a former suit and the invoking of that to defeat another action that, "These objects are accomplished by construing the statute to mean that where a suit is brought before a justice which terminates in a final judgment on the merits, there both parties shall be precluded from further litigation in relation to all matters that might have been decided in that case. The dismissal of the first case tried by the justice was in effect a non-suit and did not bar the bringing of a new suit for the same cause of action, and consequently could be no bar to bringing another suit for a different cause of action". *McKinney vs. Finch*, 1st Conn. 152. And the same doctrine is announced in the case of *Ulrich et al vs. Huntington*, 2nd Conn. 535.

We are of the opinion that it appears from the record that the appellee unlawfully obtained money from the village treasury of the village of Ina and that the dismissal of the former suit would neither bar or estop the appellee^v from recovering in this proceeding, and the judgment of the lower court is reversed and the cause remanded.

REVEREND THE JUDGE.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court

at Mt. Vernon, this..... day of April,
A. D. 1917.

Clerk of the Appellate Court.

NOINI

3073

Opinion of the Appellate Court

AT AN APPELLATE COURT, begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March, in the year of our Lord, one thousand nine hundred and seventeen, the same being the 27th day of March, in the year of our Lord, one thousand nine hundred and seventeen.

Present:

Hon. James C. McBride, Presiding Justice.

Hon. Franklin H. Boggs, Justice.

Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the Thirteenth day of April, A. D. 1917, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

Ada L. Ferrell,

Appellee

vs.

No. 76

October Term, 1916.

Southern Illinois Railway & Power Co.,

Appellant

206 I.A. 169

ERROR TO
APPEAL FROM

Circuit

COURT

Saline

COUNTY

TRIAL JUDGE

HON.

A. W. LEWIS



Term No. 70.

Appellate Court.

Specimen No. 70.

Fourth District.

October Term, 1911.

Ada L. Ferrell,
Appellee

vs.

Southern Illinois Railway
& Power Company,
Appellant.

Appeal from the Circuit Court
of Adams County.

McGrade, P. J.

Ada L. Ferrell, appellee, is the owner of a lot in Harrisburg, 50 feet in width east and west, by 100 feet in length north and south. Jackson Street lies immediately east of appellee's property. The north end of the lot abuts on Lincoln Avenue, and at the south end of the lot there is a 10 foot alley.

Appellant, under a franchise from the City of Harrisburg, during 1911, constructed, and has since operated, an inter-urban electric railway on Jackson Street in said City.

Appellee, claiming that by the construction of said railroad, the drainage from her premises had been obstructed, and that surface water had been diverted out of the natural course of drainage, and onto her premises, brought this suit to recover damages alleged to have been sustained by reason thereof. In her declaration she alleges that water naturally coming upon her premises before the construction of the road lawfully ran into and down Jackson Street: every that defendant negligently obstructed and permanently maintains in said street, to the detriment of

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the height of eighteen inches without culverts or openings to permit the passage of water; that by reason thereof large quantities of surface water were caused to overflow said lot, and to stand and remain thereon, and constructed and revented the escape of waters naturally coming upon said lot, and that by reason thereof, the market value of her premises has been depreciated.

The first hearing of the cause resulted in a mistrial. At the second hearing a verdict in favor of appellee for \$300 was returned, upon which judgment was entered, and this appeal follows.

Appellant assigns for error, the action of the trial court in denying its motion for a new trial, after leave had been given appellee to amend her declaration during the course of the trial. It further contends that having constructed its roadbed and track, at the elevation required by the City, and having no jurisdiction over the street beyond one foot on each side of the rails of the track, it is not responsible for the drainage facilities of the remainder of the street, and that if the lot fails to provide adequate ditches to care for surface waters, appellant cannot be held liable therefor. Appellant also contends that since the railroad was constructed, appellee was required to build, and did build a sidewalk along the east line of her lot on Jackson street, and that the City required, and appellee constructed this walk considerably above the surface of her lot; that the owner of the lot immediately south of the alley made a fill in said alley, and raised the grade thereof approximately one foot above the surface of appellee's lot, and appellant contends that the

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walk constructed by appellee in the street, and the fill made by her neighbor in the alley are reasonable for preventing the escape of water from her premises, and that appellant is not reasonable for these conditions. Appellate also assigned upon certain rulings of the Court touching the admission and exclusion of evidence, and in giving and refusing instructions.

The first error argued by appellant relates to the action of the trial court in admitting appellee to amend her declaration, and in denying appellant's motion for a continuance. Appellant contends that the amendment brought into the case, an issue not theretofore raised in the pleadings, and that it was not prepared to meet that issue.

The motion of appellee for leave to amend her declaration, and the subsequent motion of appellant for a continuance on account of such amendment were both addressed to the sound discretion of the Court, and the ruling thereon cannot be assigned as error, unless we can say that there has been an abuse of that discretion. (Hall vs. Jones, 1881, 101, 272 Ill., 576.) The amendment made added to the declaration a charge of diverting surface water out of the course of natural drainage and casting it upon appellee's premises. Before the amendment, the charge was that appellant, by the construction of its road, had prevented the escape of waters naturally coming upon the premises. The amendment did not inject into the declaration any charges extraneous foreign to the original charges therein contained. The charges of negligence on the part of the appellant remained as before the amendment was made. All that was added by the amendment

was an additional element of injury which appellee claimed resulted from the negligence charged.

It appears also, from the record, that from the beginning of the trial, appellant's counsel, or at least treated the location of the diversion of water on land to appellee's premises as a proper question of fact, and so to be considered in the case. The first witness called by appellee and many subsequent witnesses were examined in detail with reference to the effect of appellant's road in diverting surface water out of the course of natural drainage to and upon the property of appellee. Appellant objected no objection to the admission of the evidence upon this point that it was not admissible under the pleadings. Appellant permitted such evidence of this character to be heard by the jury, without objection, it cannot consistently say that it is surprised by an amendment which adds this charge as an element of damage in the case, especially in view of the fact that counsel for appellant say that appellee waited until nearly all of her evidence was in, before asking leave to amend.

In its affidavit for continuance made on account of said amendment, appellant claimed it could not properly proceed with the trial on account of the absence of one Frank Wynn, stating certain matters which it expected to prove by him; also the need of other evidence, not then in the power of appellant to produce, but which it expected to procure, which would show that appellant had not diverted surface water out of the course of drainage, and to the property of appellee. It appears from the record that appellant called one Lana Weaver as a witness; that he had some certain en-

gingering work in the construction of the road which it was claimed in the affidavit had been done by Sawyer, and the witness Weaver testified substantially as aforesaid which appellant stated it expected to show by the witness Payne, so that appellant's interests are not expected to have suffered because of the absence of said Payne. It was also averred in the affidavit that the witnesses which appellant had in attendance at said trial did not have sufficient knowledge of the physical conditions involved to enable them to testify upon the question of the diversion of surface water. Appellant called eight witnesses who resided on or near the property, yet so far as we have been able to discover none of them were interrogated by appellant upon the question of the diversion of surface drainage. The witness Lewis testified that he had been passing appellant's property for fifteen years, and surely he would have been informed upon that question, as was also the witness Bentley, a former city commissioner of the City of Harrisonburg, at the head of the department of streets and alleys, one who testified that he was familiar with drainage conditions in the city. Appellant did not examine either of these witnesses upon the question of the diversion of surface water by appellant's premises.

Under the circumstances disclosed by this record, we are unable to say that the denial of appellant's motion for a continuance constituted such an abuse of discretion by the trial court as to justify a reversal of the judgment upon that ground.

It would serve no useful purpose whatsoever to

review, in detail the evidence in this regard. It is sufficient to say that we find no substantial or positive or irrefragative evidence, which, is credited by the jury, fairly tended to show that appellant was guilty of the negligence charged, and that appellee had been damaged by reason thereof, as claimed by her.

The evidence fairly tended to show that prior to the construction of appellant's road, the surface of surface drainage from appellee's property was toward the east upon Jackson street; that when appellant constructed its road, adjacent to appellee's premises, large quantities of earth were hauled and deposited in the street, for the purpose of raising the roadbed to the required grade, and that the fill thus made extended to the old sidewalk along the west line of Jackson street in front of appellee's property, and thereby raised the surface of the street above the surface of the lot, and surface drainage therefore was obstructed; that in grading Jackson street appellant filled up the old surface drains in the street, and made a small ditch along the west side thereof with a road grader, and there is evidence that the bottom of this ditch is higher than the surface of the lot. There was evidence also tending to show that by reason of the construction of the road in said street, water which did not naturally flow upon said street was turned into that street, and that water flowing along the street was diverted to and east upon appellee's property.

We find no evidence in the record which tends to show that appellant exercised any diligence whatever in the way of constructing ditches, culverts or drains to take care of the surface drainage along said street, or to protect property

from surface water which might be diversionary or the course of natural drainage.

Then appellant's complaint was amended to show the city of Harrisburg, giving it the right to construct and operate its railroad along Jackson Street, is obligated also the burden necessarily attendant to the exercise of that right. If, in the construction of its railroad, it became necessary to raise the grade of Jackson Street, and if the effect of this change would be to interfere with surface drainage and divert it out of its usual and natural course, or to obstruct the flow thereof by the agency and discharge of slitting property upon appellant's railroad, and it was its duty under the law to provide for it in such culverts, ditches, and drains, so as to permit the free passage of surface water, in the usual and natural course of surface drainage. And for any omission or neglect or negligence in the discharge of this duty, it shall be liable in damages to any person injured thereby. (Strong v. City of St. Louis, Mo., 248 Ill., 94; Petherington v. City of St. Louis, Mo., 111, 129.)

Appellant complains that the railroad constructed by appellee in front of her property on the east side of Jackson Street was elevated above the surface of the lot, and thus prevents the escape of water from the lot. The evidence discloses that the lot was elevated above the railroad's road was built, and after, as appellant claims, appellee had elevated the drainage from the lot to Jackson Street. Appellant says she cannot get water to flow into any surface water, but she cannot show that it is, or that its construction and maintenance has caused water

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cast upon the appellee to remain for a longer time than it did remain, after appellant's road was constructed. There was evidence in the record which tends to show that the construction of this walk was done by appellant, and that the water diverted out of the course of drainage by appellant, and that there was some loss of water on the lot since this walk was constructed, long before that time. The effect the construction and maintenance of this walk may have had upon the property was not proper for the consideration of the jury alone, upon the facts presented in the case.

In regard to the fill made in the alley north of appellee's premises, and of the construction and maintenance of which appellant complains, it may be said that it prevents water flowing from appellee's lot to the south. The evidence however tended to show that the natural course of drainage from appellee's lot was to the east on Jackson Street, and not south across this alley. It is probably true that with the grade maintained in the street by appellant, without drainage facilities, if the fill in the alley were removed, the water would be diverted to the south, and would escape in that direction, but it is equally apparent from the evidence in the record that if appellant had not changed the grade of Jackson Street, and elevated the surface of that street above the surface of the lot, or had provided drainage facilities therein, the water from appellee's lot would readily escape to the east into Jackson Street. If the fill in the alley is wrongfully maintained there without the fault or consent of appellant, and its construction and its maintenance was and is an act over which appellant had no control, and

even if such fill could prevent and obstruct the free passage of water in the river, that there are other forces available to maintain the river, and it is not, under these grounds, excuse its own negligence, or release it from the consequence thereof. (North v. South, 111, 477; The St. Louis Bridge Co. v. The River, 111, 477; The St. Louis Bridge Co. v. The River, 111, 477.)

We cannot, without greatly extending this opinion, set out in detail the various objections which were made to the instructions given for the jury, and the reasons advanced in support of these instructions. The court, however, refused to give the instructions, as a series, and believe the jury were fairly and fully instructed as to the legal principles applying to the issues and evidence before them. The court, however, the court erred in refusing instructions which were correct. Some of the refused instructions were correct. Others related to the issues which were not correct. There was an incorrect statement of the law, not applicable to any proper issue in the case, and others did not embody correct statements of the law applicable to the case.

Whether or not excellent testimony was given in the case, and whether or not these acts occasional damages to the river, in the respects charged, were questions for the jury, they viewed the evidence, and in the light of the testimony of the witnesses, and in the light of the law, determined the questions in the case, and they were not inclined to disturb their verdict.

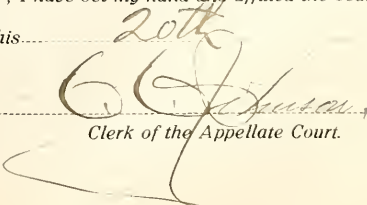
We believe the record to be free of any material error, and the judgment of the trial court will be affirmed.

Let to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court

at Mt. Vernon, this.....20th..... day of April.
A. D. 1917.


Clerk of the Appellate Court.

NOINI

3077

Opinion of the Appellate Court

AT AN APPELLATE COURT, begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March, in the year of our Lord, one thousand nine hundred and seventeen, the same being the 27th day of March, in the year of our Lord, one thousand nine hundred and seventeen.

Present:

Hon. James C. McBride, Presiding Justice.

Hon. Franklin H. Boggs, Justice.

Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the Thirteenth day of April, A. D. 1917, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

Willis Coal & Mining Co.,

Defendant in Error

vs.

No. 5

October Term, 1916.

Missouri & Illinois Coal Co.,

Plaintiff in Error

206 I.A. 192

ERROR TO
APPEAL FROM:

Circuit COURT

St. Clair COUNTY

TRIAL JUDGE

HON.

GEORGE A. CROW

Term No. 5 In the Appellate Court Appellate No. 24
 of Illinois, Fourth District,
 October Term, 1916.

The Willis Coal & Lining)	
Company,)	
Defendant in error)	
vs	)	Error to Circuit Court
Missouri & Illinois Coal	)	St. Clair County.
Company,)	
Plaintiff in error)	

Opinion by Rogers, J.

This writ of error is prosecuted to reverse a judgment in favor of defendant in error (hereafter for convenience called appellee) and against plaintiff in error (hereafter called appellant) in the sum of \$734.19 rendered by the Circuit Court of St. Clair County for 1949 tons of coal alleged to have been unlawfully mined by appellant from lands owned by appellee.

The amended declaration upon which the case was tried consisted of the consolidated common counts, with which was filed the following account:

"To 1949 tons coal mined unlawfully from June 1, 1914 to Oct. 27, 1914, from the Willis Coal and Lining Company's coal land, Petrich tract, at \$1.02½ per ton at top of mine, less cost of loading, transportation, hoisting and dunnage, estimated at 48¢ per ton (1949 tons at 55¢).....	1,164.16
Less amount paid for royalty by Missouri & Illinois Coal Company from June 1 to Oct. 27, 1914, (1898 tons at .02½).....	47.44
	<u>\$1,116.72</u>

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Appellant filed pleas of the general issue; a special plea that it did not unlawfully mine coal; and a counterclaim for \$1,674.21, composed of an item of \$64.13 for certain materials furnished appellee and \$1,610.08 for coal furnished appellee. The pleas were supported by an affidavit of merits. Issue was joined on the plea of general issue, and a replication was filed to the first special plea. To the plea of set-off an answer replied that it had given credit for the sum of \$1,617.08 for coal furnished, and admitted the amount of \$64.13. The case was tried on these issues by the Court, a jury being waived by said parties, and judgment was given appellee for \$742.19.

It is first insisted by appellant that the finding and judgment of the trial court is against the manifest weight of the evidence, and that the judgment should be reversed for that reason. The parties to this suit were both engaged in the business of mining coal at Millisville, Illinois among other places, and had had business dealings and contract relations for many years before this controversy arose. On May 25, 1914 the parties entered into a new contract or license, revocable at the pleasure of the licensor, revoking certain named prior contracts or licenses and setting forth certain mining rights to be allowed appellant in lands owned by appellee. Among other prior licenses revoked was a license to take coal from a certain tract known as the Metrich tract.

It appears from the evidence that under the previous license the defendant was authorized to mine coal under

the Detrich tract upon paying a royalty of 24¢ per ton. Appellant admits that after the making of the contract of May 26, 1914, it mined coal under the Detrich tract as contended by appellee, and further practically admits that the amount of coal so mined was 1949 tons, being the amount specified in appellee's copy of account owed on. Appellant further admits that under said contract its previous right to mine under said tract was revoked and that it had no further right therein. Appellant contends however that the fact that it did so mine coal was known to appellee through its officers and that appellee acquiesced therein with full knowledge that it was so mining coal under said Detrich tract.

It is further contended by appellant that if appellee had knowledge of and acquiesced in the taking of coal by appellant under the Detrich tract after May 26, 1914, that all appellee would be entitled to would be 24¢ per ton, the amount of royalty paid under the cancelled lease. On the other hand appellee contends that it had no knowledge that appellant was mining coal under said tract after the execution of the contract of May 26, 1914 until some time in the latter part of September or the first days of October, 1914.

The evidence discloses that beginning with June, 1914, appellant rendered statements to appellee for coal purchased by appellee from appellant, in which statements credit was given appellee of 24¢ per ton on the coal mined by appellant under the Detrich tract. These statements were received by the book keeper of appellee but the evidence fails to show that knowledge of these credits for royalties

were brought to the knowledge of the managing officers of appellee until the laterpart of September or first days of October as above set forth.

The burden of proof was on appellant to show by the evidence that appellee, through its officers, had knowledge of and acquiesced in the taking of coal under said tract, and unless it has done so, appellee would not be estopped to enforce its rights for the coal taken just the same as though there had not been any prior lease. The contract declaring null and void prior leases held by appellant from appellee is broad and inclusive. Section 1 of said contract is as follows:

"It is mutually agreed between the parties hereto that all of the leases, contracts, licences and instruments in writing referred to in the preamble hereof, which said preamble is hereby expressly referred to and made a part of this agreement are and each of them is hereby canceled, annulled, set aside and they are to be of no further force or effect, and they shall not henceforth confer any right, power, privilege, benefit, duty or liability in favor of or against either of the parties hereto."

We, therefore, hold that the evidence is not sufficient to show a waiver by appellee of the provisions of the contract of May 25, 1914, nor is it sufficient to establish an estoppel as against appellee. A waiver is the intentional relinquishment of a known right, and there must be both knowledge of the existence of the right and an intention to relinquish it. *American & Eng. Ency. of Law* (2nd Ed) vol. 29; page 1091. *Perin v. Parker*, 126 Ill.2d.

The law further is that a waiver will not be implied from slight circumstances, but must be evidenced by an unequivocal and decisive act, clearly proven. If the act is not of such a character, or is not inconsistent with the enforcement of the right claimed to have been waived, or an intention to rely upon it, no waiver is established. American & Eng. Ency. of Law (2nd Ed) Vol. 29, page 1105; Hennecke v. Insurance Co., 105 U.S. 30.

It is further contended by appellant that the book keeper of appellee who received the statements rendered by appellant above mentioned and which included a credit of 24¢ per ton on the coal taken from the Betrich tract should be held to be notice to appellee. Where notice through an agent is relied upon the nature of the agency must be such that the law will presume that the agent carried the notice to his principal or it must be established as a fact that the agent communicated to his principal such notice. U.S.A. v. N. & Co. v. Hammond, 210 Ill. 187. Home Bank v. Florida Trotting Society, 206 Ill. 14.

The evidence in the record does not disclose that it was the duty of the bookkeeper of appellee to inform the managing officers of appellee with reference to the credit referred to, neither does the evidence disclose that such bookkeeper did in fact inform the managing officers of appellee with reference thereto, so that under the law, appellee would not be held to have received such notice.

It is further to be observed in connection with the question of notice, that the Betrich tract was not referred to as such in any of the reports or statements. All

that the reports or statements disclosed were that a credit of 2½¢ per ton was given as to certain coals mined by appellant, but as to what tract said coals were taken from it nowhere appears. It is argued by appellant that the only tract it had ever paid 2½¢ per ton on was the Petrich tract, and that therefore, that of itself, it could carry the notice to appellee that coal was being taken from under said tract. Whether or not this information, if brought to the notice of the managing officers of appellee, would be sufficient to charge appellee is not necessary for us to decide as the record does not present that question. We hold, however, that this information to the bookkeeper of appellee under the evidence in this case wholly fails to show notice to appellee as there is nothing in the evidence that would indicate that the bookkeeper had any knowledge with reference to where the coal was being taken from that was being mined by appellant under lands owned by appellee.

The evidence further discloses that one A. J. Stewart, an engineer in the employment of appellee, sometime in the latter part of August, 1914, was employed by appellant, with appellee's permission, to make certain surveys, which surveys disclosed that appellant had been taking coal under the Petrich tract. It is insisted by appellant that the knowledge acquired by said engineer should be held to be notice to appellee. This survey was made by Stewart on behalf of appellant and not on behalf of appellee, and appellee would therefore not be chargeable with the knowledge of the facts that came to said engineer as to or at the agent of appellee in making said survey and not acting on its behalf.

It is next insisted by appellant that the judgment rendered by the trial court was excessive. The evidence discloses that credit was given by appellee for the \$111.00 claimed by appellant as a set-off and also that appellee gave credit on the trial for the \$64.11 and certain other items claimed by appellant. The only question remaining then with reference to the size of the judgment is as to whether or not the finding of the court with reference to the value of the coal taken from appellant's lands after deducting the expenses of mining and loading the same, was excessive. The record discloses that appellee was buying all of appellant's coal at \$1.00 per ton and that this is the amount that appellee is seeking to recover from appellant for the coal taken. Appellee in the copy of account sued on credits appellant with 40¢ per ton for mining, loading, hoisting, etc. The trial court allowed appellant a credit it seems of 50¢ per ton as the expenses in connection with the mining, etc. of the coal taken and gave judgment to appellee for 50¢ as the net value of the coal taken. The evidence as to the expenses of mining, transportation, hoisting, dumping, etc. of the coal mined was conflicting and we are not able to say that the finding of the trial court on this controverted question of fact was against the manifest weight of the evidence. Not being able to do so, we should not disturb the judgment on that account. *Harboefer vs. Brazier*, 15 Ill. 577; *Gilvie vs. Copeland*, 145 Ill. 98.

Lastly, it is insisted by appellant that the court erred in refusing certain propositions of law submitted by it on the trial of said cause. All of the propositions of law submitted by appellant and which were marked refused by

the trial court were abstract in form, and for that reason, if for no other, there was no error in the court refusing to hold the same. We find, however, in examining the record in this case that the court held the first, third, fourteenth and fifteenth propositions of law submitted by appellant. Said propositions so held substantiate, cover the law in this case and appellant was in no way prejudiced by the refusal of the trial court to hold on the last two propositions marked refused, even though they had been otherwise proper.

Finding no reversible error in the record, the judgment will be affirmed.

Judgment affirmed.

Not to be reported in full.

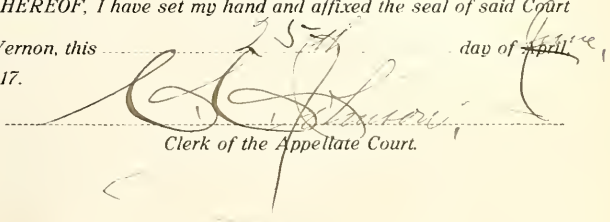
I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court

at Mt. Vernon, this

A. D. 1917.

25th day of April, 1917.


Clerk of the Appellate Court.

NOINI

3100

Opinion of the Appellate Court

AT AN APPELLATE COURT, begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March, in the year of our Lord, one thousand nine hundred and seventeen, the same being the 27th day of March, in the year of our Lord, one thousand nine hundred and seventeen.

Present:

Hon. James C. McBride, Presiding Justice.

Hon. Franklin H. Boggs, Justice.

Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the Thirteenth day of April, A. D. 1917, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

Belle Duncan,

Appellee

vs.

No. 16

October Term, 1916.

Louis E. Kammeier, et al,

Appellants

206 I.A. 207

ERROR TO
APPEAL FROM

Circuit

COURT

Marion

COUNTY

TRIAL JUDGE

HON.

WILLIAM B. WRIGHT

Term No. 16

In the Appellate Court

Page 10.50

of Illinois, Fourth District.

October Term, 1916.

Julius Pearce,

Appellee

vs.

Louis Fanneier, J.B. Gleason

and August Gansauer,

Appellants

Appeal from the Circuit Court
of Marion County, Illinois.

Opinion by Logan, J.

An action on the case was instituted by appellee against appellants in the Circuit Court of Marion County under the provisions of Sec. 9 of the Dram Shop Act to recover damages for injury to her means of support. The declaration consists of two counts. The first count alleged in substance that appellants, Louis F. Fanneier and August Gansauer, saloon keepers in Central City, Illinois, sold or gave to one Charles Wood intoxicating liquors; that such intoxicating liquors in whole or in part caused said Charles Wood to become intoxicated and that while in such condition and in consequence thereof the said Charles Wood shot and killed the husband of appellee, thereby injuring her in her means of support. The second count in substance is the same as the first count, except that it contains the additional allegation, that appellants, Fanneier and Gansauer, willfully sold and gave intoxicating liquor to said Charles Wood, then and there knowing the said Charles Wood to be an habitual

drunkard. Each count of said declaration further alleges that appellant, Tiemann, was the owner of the building and real estate occupied by appellee, Louis J. Bonnier, as a drunk shop and alleges knowledge on the part of appellant, Tiemann, that intoxicating liquors were sold and to be sold in said premises. To said declaration, appellee entered a plea of the general issue. A trial was had resulting in a verdict and judgment in favor of appellee and against appellants for the sum of \$3450.00. To reverse said judgment this appeal is prosecuted.

The record discloses that about 11:30 P. M. on August 13, 1914, Thomas Watson, village Marshall of Central City, deputized one Phillip Warren to assist him in arresting one Charles Woods; that said Marshall with said deputy went to the home of Woods to make said arrest where the evidence discloses that appellee, with her husband, and certain other persons, had gathered. Before said arrest was made the evidence discloses that three shots were fired resulting in the death of Mr. Watson, village Marshall, and in the death of Duncan, husband of appellee. The evidence does not directly disclose as to who fired the shot that killed Watson, but the evidence does disclose that the shot that killed Warren was fired by Woods.

At the close of appellee's evidence and again at the close of all the evidence, instructions were submitted by appellants directing a verdict of not guilty as to all of said defendants, and separate instructions were submitted directing a verdict as to each of said defendants separately. All of which instructions were refused by the court. It is now insisted by appellants that the court erred in its rulings thereon.

without going into a critical examination of the evidence, it is only necessary for us to say that as to defendants, Kumsaier and Tiemann, the evidence tended to show sales of liquor by Kumsaier on the day in question which in whole or in part caused the intoxication of Charles Woods, and that in consequence of such intoxication Charles's husband was shot. The trial court therefore did not err in refusing to direct a verdict in favor of defendants, Kumsaier and Tiemann.

We hold, however, that the court did not in refusing to direct a verdict of her guilt of the defendant Ganssauer for the reason that the evidence does not fairly tend to show a sale or sales of liquor by Ganssauer contributing in whole or in part to Woods' intoxication on the day in question. Eli Babo, a witness called on behalf of the appellee, testified on direct examination that Woods came into Ganssauer's saloon between four and five o'clock and got a can of beer. On cross examination the witness, Babo, was asked this question. "Now, tell the jury just what took place there? (Referring to Ganssauer's saloon). "Well, I was in there and I and Ganssauer were talking; Woods stopped in at the door and set the can up and come, 'Here's a glass worth of beer'." Q. "Go ahead and state what occurred then?" A. "He set the bucket down and Ganssauer asked if he had any said, 'I can't sell you no beer.' " "He said, 'It ain't no me, Mr. Baldridge sent me for this.' Then Ganssauer handed him the beer at first and then he said 'It ain't for me, Mr. Baldridge sent me for it', and then Ganssauer waited on him." "Orthold Baldridge, a witness on behalf of appellee testified that on the day in question, Charles Woods was

working for him doing chores and washing and that he gave him ten cents and told him to get to work."

The evidence tended to show that the appellant's preference was had to a can of beer. This was probably all the testimony offered on the part of appellee in his case connecting appellant Gansauer with the sale or gift of intoxicating liquor to Woods on the day of the murder of appellee's husband. The evidence on the part of appellant is to the effect that after leaving Gansauer's saloon, which was located only about 100 or 125 feet from Pickles's butcher shop, eye witnesses saw Woods leave the saloon and go directly to the meat market and that from the time of receiving the beer at Gansauer's saloon until he arrived at the butcher shop he drank none of the beer whatever. The evidence is further to the effect that when he reached the butcher shop that the witness, Pickles, who was in the employ of Pickles in the shop as meat cutter, drank over half of the beer and that so far as he observed, Woods drank none of it. The witness Pickles, after testifying that he drank over half of the beer in question, testified that he did not drink from the can, however, he later qualified his testimony by saying that he did not know whether Pickles drank any of the beer or not. There is no evidence on the record either on the part of appellee or of appellant as to whether or not Woods drank any of the beer gotten by him at Gansauer's saloon that day.

The record further discloses that the beer was obtained from Gansauer's saloon between 10:30 and 11:00 o'clock in the afternoon, and the killing of appellee's husband did not occur until after eleven o'clock that night. There is,

therefore, no evidence in the record from which the jury could find that any liquor obtained at Langner's saloon on the day in question caused Wood's intoxication, in whole or in part, unless it would be warranted in so holding, from the mere fact that the evidence disclosed that he was a drinking man. We do not believe they could be so warranted, especially in view of the fact that the evidence tends to show that he didn't drink any of it.

We therefore hold that the trial court should have directed a verdict in favor of defendant Langner and it was error not to do so.

It is insisted by appellant that no exemplary damages can be awarded in this case. The contention of appellants being as stated in their brief that appellee had no interest whatever in the wages or property of the subject Charles Woods. A sale of intoxicating liquor to Charles Woods would not in any way violate any of his rights any more than it would any other member of the people of the State of Illinois. We conceive the law to be that in order for a plaintiff, when suing under the Draughon Act of the State of Illinois, to recover exemplary damages, the plaintiff must prove by a preponderance of the evidence that positive wrong wilfully inflicted or caused to the plaintiff, or some gross neglect of the plaintiff's rights. We do not believe the position of appellants will be taken. Section 9 of Chapter 43 of the Revised Statutes, being the section of the statute giving a right of action to every husband, wife, child, parent, guardian, employer, or other person, who shall be injured in person or property or means of support

by an intoxicated person or in consequence of intoxication, habitual or otherwise, of any person, for all actual damages sustained in addition thereto and also the recovery of exemplary damages. In concerning this statute the courts have held that in order to warrant exemplary damages the sale of liquors must be wilfully or wantonly done. The second count of this declaration charges a retail sale of intoxicating liquors to said Charles Woods, and that he knowing the said Charles Woods to be an habitual drunkard. Section 6 of said Chapter 43 provides among other things, "that whoever by himself or his agent or servant shall sell or give intoxicating liquors to any minor, without the written order of his parent, guardian, or legally authorized, or to any person intoxicated, or who is in the habit of getting intoxicated, shall for each offense be fined, etc. In, therefore, appellants sold intoxicating liquor to Charles Woods, knowing him to be an habitual drunkard, they violated the express provisions of the law, and the sale made in its very nature to wanton and wilful. In the case of *Wheeler v. Cox*, reported in 89 Ill.App. at page 553, the same character of a case as this the wife was suing a drink shop keeper for injury to her means of support alleged to have been caused by the sale of intoxicating liquor to a third party, of whom of which he became intoxicated and in consequence thereof, shot and killed the husband of the plaintiff, and the question was raised as to whether the wife was allowed to recover exemplary damages. The court at page 553 says: "The instruction so criticised, and the modification of another containing the same point, are in effect that if plaintiff

knew that Bowman was intoxicated, or he intentionally intoxication, and wantonly and maliciously sold intoxicating liquors to him, and that the intoxication consequent upon such sale resulted in the death of Oscar Co., and if plaintiffs were thereby damaged in their person or property, they are entitled to recover exemplary damages. It is further so directed that such instruction was not faulty. There was evidence tending to show that Bowman was already intoxicated when the jug of whisky was obtained by him, and also that he was in the habit of getting intoxicated, and that appellant knew or by the exercise of ordinary observation should have known both facts. If the jury believed the evidence proved these facts, it would then follow that appellant had violated the statute, committed a criminal offense, and if so true, as the instruction implied, that Bowman was already intoxicated, or was in the habit of getting intoxicated, it would also follow that he intended to violate the statute prohibiting the sale of intoxicating liquors to such a person, and it would be as anomalous to say that an intentional commission of a criminal offense would not be willful and wanton. Hence we are of the opinion in such instruction there was no error." We, therefore, hold that the right to recover exemplary damages is not limited to sales of intoxicating liquors to persons to whom the party claiming damages may sustain some relationship, as father, husband, wife or child.

It is next insisted that the instructions given on behalf of appellee with reference to the allowance of exemplary damages should not have been given at all, as the court failed to instruct the jury as to the ground on which they would be warranted in allowing exemplary damages. In

other words that the court gave the jury instructions allowing them to award exemplary damages without a finding the meaning of the term or as to when or how exemplary damages might be allowed, etc. We think that such instructions and the jury should have been instructed on when and how exemplary damages may be allowed by the court.

It is next insisted that the court acted in allowing an amendment to the declaration after a motion for a new trial had been overruled. The amendment made to the declaration was the addition of the words, "in consequence thereof" after the averment of the intoxication of Woods. The evidence was heard and the trial conducted in keeping with the allegations of the declaration as amended. There was therefore no error in the court's ruling in refusing the motion. *Kennedy v. Smith*, 134 Ill. 604.

It is next insisted that the court acted in permitting evidence to be offered on the part of the appellee to the effect that Charles Woods was an habitual drunkard and that, that fact was known to appellants. The declaration charged that Woods was an habitual drunkard and that knowing this fact appellants wilfully made a sale to him. We think this evidence was proper to be admitted and considered in connection with the claim for exemplary damages. *England vs. Cox*, supra, *Kennedy v. Smith*, 134 Ill. 604.

It is next insisted that the court acted in refusing to give the first, second and third instructions and in modifying instruction No. 11. The modification to instruction No. 11 consisted in the addition of the words "as to such cases" at the end of the instruction as tendered. In such cases, there was evidence of

but one sale of liquor by Dancaster in which goods and any connection, there was no occasion for the repetition, and the instruction should have been given as amended.

Appellant's first assigned instruction charges the jury that they cannot allow exemplary damages. In view of what we have said above it was not error to refuse this instruction. Instruction No. 2 is involved and is misleading and there was no error in refusing it. Instruction No. 3 was covered in effect by given instruction No. 11, and there was no occasion for repeating the instruction.

Lastly, it is insisted that the verdict of the jury is excessive, but as this case is to be retried, there is no occasion for discussing this assignment of error, further than to say that the verdict, in view of the evidence in the record was a substantial one.

For the reasons above set forth the judgment is reversed and the cause remanded.

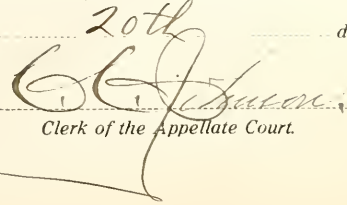
Reversed and remanded.

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court

at Mt. Vernon, this.....20th..... day of April,
A. D. 1917.


Clerk of the Appellate Court.

NOIN

3102

Opinion of the Appellate Court

AT AN APPELLATE COURT, begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March, in the year of our Lord, one thousand nine hundred and seventeen, the same being the 27th day of March, in the year of our Lord, one thousand nine hundred and seventeen.

Present:

- Hon. James C. McBride, Presiding Justice.
- Hon. Franklin H. Boggs, Justice.
- Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the Thirteenth day of April, A. D. 1917, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

The Toledo, St. Louis & Western
Railroad Co.,
Plaintiff in Error

vs.

No. 24
October Term, 1916.

East St. Louis & Suburban Ry. Co.,
Defendant in Error

206 I.A. 216

ERROR TO
APPEAL FROM

City COURT

East St. Louis COUNTY

TRIAL JUDGE

HON.

GEORGE A. CROW

Term No. 24. In the Appellate Court Appends 20.14
of Illinois, Fourth District.
October Term, A. D. 1916.

Toledo, St. Louis & Western)	
Railroad Company,)	
Plaintiff in error)	
vs.	)	Error to the Circuit Court of
East St. Louis & Suburban	)	St. Clair County, Illinois.
Railway Company,)	
Defendant in error)	

Opinion by Loggs, J.

On October 7, 1901, a contract was entered into between plaintiff in error, Toledo, St. Louis & Western Railroad Company, with the Mississippi Valley Transit Company for the purpose of permitting said Transit Company and its agents to cross plaintiff in error's right of way and tracks on the line of the public highway crossing, west of Edwardsville. The rights and privileges acquired by the Mississippi Valley Transit Company was thereafter assigned to the defendant in error, East St. Louis & Suburban Railway Company.

Said contract contained numerous provisions, but it will only be necessary for us to consider the fourth and seventh sections of said contract. Section four provided that the second party (Mississippi Valley Transit Co.) will bring all of its cars to a full stop before attempting to cross the tracks of said first party (plaintiff in error).

and said cars shall remain standing until the conductor in charge of said cars of the second party flag said crossing." Section seven provides, "that the party of the second part assumes full responsibility for the proper maintenance and operation of the crossing, and will indemnify and save harmless the said party of the first part, its successors and assigns, against all loss, damage, costs, expense, actions, claims or demands whatsoever, which it or they may at any time suffer or be subject or liable to, by reason of the condition of the crossing or the failure of the said second party to flag as provided for in section four of this contract".

At a point just south of the city limits of Edwardsville the Mitchell and Madison Railroad tracks are laid in an easterly and westerly direction, and intersect the West St. Louis & Suburban Railway track which is located on what is known as the Troy road, a public highway leading west out of Edwardsville. At a point about fifty feet south of the I. & M. Railroad track are the tracks of plaintiff in error which run in an easterly and westerly direction. Plaintiff in error has five tracks at the point in question. The distance between each track being about fifteen feet, and all of which tracks intersect the Troy road and defendant in error's suburban track.

At about 8 o'clock P.M. on April 2, 1911, an electric car operated by defendant in error running in a southerly direction was struck by a freight train backing into it from the west on the south track of plaintiff in error's railroad, at the crossing above mentioned, knocking

the rear trucks of the car off the track and otherwise injuring the same. Anna Perenchio, a passenger on defendant in error's car was severely injured in this collision. At the November Term, 1911, of the City Court of East St. Louis, Anna Perenchio brought suit against plaintiff in error and defendant in error to recover damages for the injuries suffered in this collision. The suit was removed to the Federal Court by plaintiff in error, and during the trial said suit was dismissed as to defendant in error. A verdict was rendered against plaintiff in error for \$6,800.00 on which verdict judgment was rendered.

At the January Term, 1914 of the City Court of East St. Louis plaintiff in error brought suit against defendant in error on the above mentioned contract to recover the amount of the judgment, interest and expenses incurred in connection with the suit brought by Anna Perenchio, on which judgment was rendered in the Federal Court.

The declaration consisted of seven counts. A demurrer was sustained to the third, fourth and fifth counts. A plea of the general issue was filed to the remaining counts, all of which were predicated upon an alleged breach of the provisions of section 4 of the contract above set forth. The case was tried twice in the City Court of East St. Louis, resulting each time in a verdict in favor of defendant in error. After the first verdict a new trial was granted by the City Court. On the second trial judgment was rendered against plaintiff in error for costs. An appeal was taken to this court where the judgment was reversed for error in the trial court refusing to admit testimony explaining the

meaning of the term "flagging a crossing" as used in sections 4 and 7, and on account of a certain erroneous instruction given on behalf of defendant in error. The opinion in said cause being filed on December 1, 1918.

On said cause being reinstated a change of venue was taken to the Circuit Court of St. Clair County, a trial had, resulting in a verdict in favor of defendant in error. Judgment was rendered against plaintiff in error in bar of action and for costs, from which judgment this appeal is prosecuted.

The principal ground urged by appellant for a reversal of the judgment of the trial court is that the verdict is against the manifest weight of the evidence. Practically the only issue in the case was whether or not the conductor in charge of defendant in error's electric car in question flagged the crossing as contemplated by section 4 of the contract sued on. Plaintiff in error in its reply brief says, "Plaintiff in error's negligence is in no wise involved; the sole question is, did the conductor flag the crossing."

The evidence tends to show that for some reason defendant in error's electric car was stopped on the south track of plaintiff in error, and that it remained there for about one to two minutes before it was struck by plaintiff in error's train. This evidence tends to corroborate the testimony of the conductor and motorman in charge of said electric car to the effect that no train was in sight at the time defendant in error's conductor motioned for the motorman to cross plaintiff in error's track. Even though the train was moving at only six or eight miles per hour it would cover

several hundred feet in two minutes time, and as the testimony tended to prove there was no light on the end of this freight train as it was backing up, it is, therefore, not at all improbable that the conductor in charge of said electric car did not, at the time he flaged said crossing, either see or hear any train. At any rate the evidence was conflicting and we are not able to say that the finding of the jury on the controverted questions of fact was against the manifest weight of the evidence, and unless we can do so, we are not warranted in reversing the judgment on that ground. The evidence on this controverted question of fact was sharply conflicting. *Day v. Sampsell*, 148 App. 88; *Niederer v. Gridley*, 143 Ill. App. 88.

The evidence on the part of the defendant in error is to the effect that the motorman in charge of the electric car in question stopped the car before crossing the L. & N. tracks; that the conductor went ahead across the L. & N. tracks and then motioned the motorman to come on, which he did; that after crossing the L. & N. tracks and before crossing the tracks of plaintiff in error he stopped his car again; that the conductor then went ahead on to the main tracks of plaintiff in error, looked up and down the track and motioned the motorman to come on, and that when the car reached the last track on the south side of the right-of-way it suddenly stopped and was detained as shown from the evidence from one to two minutes. It was while said electric car was on this track that the freight train of plaintiff in error backed into it and injured Anna Ierenschie.

The testimony on the part of the motorman and con-

ductor in charge of said electric car is to the effect that at the time the conductor signaled the motorman to cross the tracks of plaintiff in error, no train could be seen; that the freight car that struck defendant in error's electric car as it was being backed, had no brakes and that there was no light on the same, and that no bell or whistle was sounded. On the other hand, the evidence on the part of plaintiff in error is to the effect that at the time the conductor of defendant in error's electric car walked ahead of said electric car, the freight train of plaintiff in error in question could have been seen, and that before the electric car had started across the track of plaintiff in error, certain of the servants in charge of plaintiff in error's train holloed at said conductor, warning him not to cross the track, but that he gave no heed and signaled the motorman in charge of said car to come on. The conductor and motorman of defendant in error both deny hearing any one holloed until the electric car had stopped on the track where it was struck. Several of the passengers on said electric car also testified on behalf of defendant in error that they heard no warning from anyone until the car stopped just prior to being struck.

Two witnesses testified on behalf of plaintiff in error that the conductor in charge of said electric car stated right after the accident in question that he saw the freight train, but thought they could get across in plenty of time, and that they would have cleared the track and escaped injury had the electric car not been stopped on the track in question. This testimony was denied by the conductor.

The record discloses that "to flag the crossing" as contemplated under section 4 of said above contract, required, according to the testimony of Sumner, an expert witness who testified on behalf of plaintiff in error, that a party to flag a crossing, "looks in both directions up and down the track to see if anything is approaching and should listen. He should see that the way is clear. If he goes to the crossing after he stops his car, looks in both directions and can see nothing, listens and can hear nothing, then if he gives the signal to the motorman to come across, that is flagging the crossing within the meaning of these terms." This definition was given by Mr. Sumner and he was corroborated in this definition by several other expert witnesses.

It is next contended by plaintiff in error that the court erred in its rulings on the evidence. The motorman testified on behalf of defendant in error, without objection, that the air-brake caused the car to stop when it did; that he tried to release the air something like four times, but was unable to do so. In rebuttal plaintiff in error offered to prove that no air brake then in use would perform in the manner testified to by the motorman. An objection to this testimony was sustained on the ground that it tended to submit an immaterial issue. Plaintiff in error then moved to exclude all of the testimony of the motorman in regard to the air having stopped his car. The trial court refused to exclude the evidence on the ground that no objection was made to it at the time it was offered. There was no error in the ruling of the court in refusing

the evidence tendered by defendant in error in rebuttal. We think, however, the court should have excluded the testimony of the motorman in regard to the air-brake having stopped the electric car as claimed by him, even though the evidence was not objected to at the time it was offered, as it did not tend to prove any issue in the case. We think, however, that the error was not a serious one and we would not feel like reversing the case on that ground.

It was also insisted that the court erred in refusing to direct a verdict in favor of plaintiff in error at the close of all the evidence. We are of the opinion that the evidence on the part of the defendant in error fairly tended to show that the conductor in charge of defendant in error's electric car flagged the crossing as the term is explained by the evidence in the record. This being true, the motion made by the plaintiff in error to direct a verdict in its favor was properly denied.

Three juries have heard this case and in each instance have found the issues in favor of defendant in error. Where three juries have passed upon a case and have each found the same way an Appellate Court will be slow to disturb the verdict in the absence of prejudicial error. *Wett v. Parlin, et. Co.* 140 App. 92; *Wills v. Larrance*, 180 App. 83; *Leville, et. Co. v. Coe*, 128 App. 308.

The judgment of the trial court will therefore be affirmed.

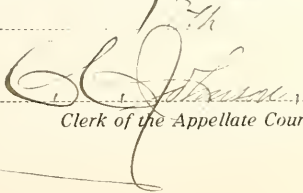
Judgment affirmed.

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court

at Mt. Vernon, this 17th day of April,
A. D. 1917.


Clerk of the Appellate Court.

Opinion of the Appellate Court

AT AN APPELLATE COURT, begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March, in the year of our Lord, one thousand nine hundred and seventeen, the same being the 27th day of March, in the year of our Lord, one thousand nine hundred and seventeen.

Present:

Hon. James C. McBride, Presiding Justice.

Hon. Franklin H. Boggs, Justice.

Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the Thirteenth day of April, A. D. 1917, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

C. Heitmeyer,

Appellee

vs.

No. 27

October Term, 1916.

The Baltimore & Ohio Southwestern

R. R. Co.,

Appellant

206 I.A. 224

ERROR TO
APPEAL FROM

Circuit

COURT

Clay

COUNTY

TRIAL JUDGE

HON.

W. P. WRIGHT

Term No. 27

In the Appellate Court

Session No. 8

of Illinois, Fourth District.

October Term, A. D. 1918.

C. Leitner, appellee

vs

The Baltimore & Ohio

Southwestern Railroad

Company, appellant

} Appeal from Circuit Court of
Clay County, Illinois.

Opinion by Rogers, J.

This appeal is prosecuted by appellant to reverse a judgment in favor of appellee for \$75.00 recovered in the Circuit Court of Clay County in an action on the case.

Appellee's declaration consisted of three counts. The first of which charged that appellant negligently suffered large quantities of dry grass, weeds, etc., to accumulate on its right-of-way and that fire thrown from a locomotive engine of appellant ignited the grass, etc., on the right of way, and that fire was communicated therefrom to the farm of appellee, destroying his straw, hay, meadow, etc.

The second count alleged that appellee was the owner of a stubble meadow of about 20 acres; that appellant was the owner of and operating a railroad extending along and adjoining said meadow and that sparks and brands of fire escaped from the locomotive engine of appellant, through the carelessness and negligence of appellant and set fire to said

stubble; and that the fire was spread and was communicated to the stubble meadow whereby the same of the value of \$100.00 was destroyed and wholly lost to the plaintiff.

The third count alleges that appellee was the owner of a stack of straw and certain stacks of hay and a certain stubble meadow; that appellant was the owner of a railroad running through appellee's land and was possessed of the right of way adjoining the railroad track; that appellant negligently failed to keep its right of way free from dry grass, weeds, etc; that fire thrown from a certain locomotive engine of appellant ignited the dry grass on the right of way and that the fire spread to the stack of straw and the stacks of hay and the meadow of the value of \$200. thereby consuming the same.

A plea of not guilty was filed, the case was tried resulting in a verdict and judgment as above set forth.

The record discloses that appellee is the owner of a farm in Oskaloosa Township in Clay County; that appellant owns a right-of-way of 100 feet in width extending through his said farm; that on Oct. 27, 1919, a fire occurred that destroyed from three to six tons of wheat straw belonging to appellee and about 20 tons of hay, and burned off something like 15 or 20 acres of meadow land belonging to him.

It is first contended by appellant that the court erred in refusing to direct a verdict in its behalf. Without going into the evidence in detail, it is sufficient to state that the evidence on the part of appellee tended to sustain the averments of his declaration, and there was no error in the court refusing to direct a verdict in appel-

lant's favor.

It is next contended by appellant that the court erred in giving appellee's second instruction. Said instruction is as follows: "The court instructs the jury that if you believe from the evidence under the instruction of the Court, that plaintiff has sustained damages, defendant company would be liable for the damages sustained by plaintiff to which you should add his reasonable solicitor's fee."

The court erred in giving this instruction. First, for the reason that without submitting the question of the liability of appellant under the pleadings in the case to the jury, it directed the jury that if they believed from the evidence that appellee sustained damages that then the defendant would be liable for the damages. Second, said instruction directs the jury in assessing appellee's damages, to add to the same his reasonable solicitor's fees. Before appellee would be entitled to recover attorney's fees against appellant, he must prove by a preponderance of the evidence that appellant allowed dead grass, dry weeds, or other dangerous or combustible material to accumulate on its right-of-way, and that the fire complained of was set out on said right-of-way and by reason thereof, spread to the premises of appellee. Section 1 of the act in relation to fencing and operating railroads, being section 62 of Chap. 114 of Hurd's A.S.

In the case at bar it was a question of fact for the jury as to whether or not the fire originated on appellants right-of-way. Some of the witnesses testified to the effect that when they first observed the fire it was not on

appellant's right-of-way. There being a conflict in the evidence the court should not have summarily instructed the jury that in giving damages they should allow to appellee a reasonable attorney fee.

It is insisted by appellee that any error or omission contained in the instruction complained of was cured by other instructions given by the court on behalf of appellant. This instruction directed a verdict and the error was of such a character that it could not be cured by other instructions. *Brigger vs. A.B. & C.R.R.Co.* 242 Ill. 544; *L.W.R.Co. vs. Smith*, 208 Ill. 608.

It is next insisted by appellant that appellee is not entitled to recover in this case for the reason that he was aware of the fire which finally spread to his premises and burned his property, and that being so aware of said fire, he failed to assist in fighting the same, and in preventing a destruction of his property, and that therefore, he cannot recover. On the other hand appellee insisted that while he did not fight said fire the reason that he did not so fight the fire was because he was physically unable so to do on account of rheumatism, and other physical disabilities. We think, the question as to whether or not appellee was negligent in not fighting the fire was for the jury to determine and that, that question was properly submitted to them.

For the error in giving appellee's second instruction, the judgment is reversed and the cause is remanded.

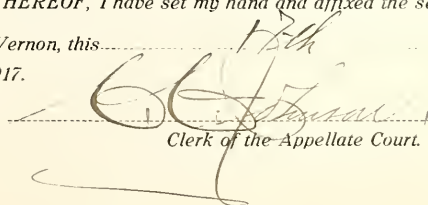
Reversed and remanded.

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court

at Mt. Vernon, this 15th day of April,
A. D. 1917.


Clerk of the Appellate Court.

NOIN

Opinion of the Appellate Court

AT AN APPELLATE COURT, begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March, in the year of our Lord, one thousand nine hundred and seventeen, the same being the 27th day of March, in the year of our Lord, one thousand nine hundred and seventeen.

Present:

Hon. James C. McBride, Presiding Justice.

Hon. Franklin H. Boggs, Justice.

Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the Thirteenth day of April, A. D. 1917, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

206 I.A. 234

Oby Dawson,

Appellee

ERROR TO
APPEAL FROM

vs.

Circuit COURT

No. 37

October Term, 1916.

East St. Louis & Suburban Ry. Co.,

Appellant

Madison COUNTY

TRIAL JUDGE

HON.

GEORGE A. CROW

Term No. 37. In the Appellate Court Agenda No. 62
of Illinois, Fourth District,
October Term, 1916.

Oby Dawson, Appellee	}	
vs.		Appeal from Circuit Court
East St. Louis & Suburban		Madison County, Illinois.
Railway Company, Appellant		

Opinion by Hoggs, J.

This appeal is prosecuted from a judgment of 1916 rendered by the Circuit Court of Madison County in an action on the case, brought by appellee against appellant to recover for certain injuries sustained by him while driving a team and wagon on the streets of Collinsville, when the same was struck by one of appellant's cars. The declaration as originally filed contained two counts. The second count charged willful negligence. The suit, however, was dismissed as to this count at the conclusion of appellee's evidence. The first count being the count on which said cause was tried, charged that appellant operated an electric street car line along Vandalia street in the city of Collinsville, and that appellee, while in the exercise of due care for his own safety was driving upon said street, was by reason of the negligence and improper conduct of appellant in the operation of one of its cars, through its servants, struck with great force and violence and injured. A trial by jury

resulted in a verdict and judgment as above set forth.

It is insisted by appellant for a reversal of the judgment in this cause that the verdict of the jury is against the manifest weight of the evidence. The record discloses that at the place on Vandalia street in the City of Collinsville where the injury occurred, appellant had a single track laid in the center of said street. A few days previous to the injury there had been a snow fall, and the city had cleaned the gutter, sweeping the snow toward the center of the street, and appellant's track, and the street car Company had swept the snow from its track toward both sides of the street. The evidence on the part of appellee tends to prove that the snow was ridged to a depth of some fourteen inches to two feet on each side of appellant's track, and that vehicles were travelling in the center of said street, it being the only place in the street that was in suitable condition for travel. The evidence on the part of appellee was further to the effect that on January 1, 1916, the day in question, he was driving a team of young mules attached to a wagon, in which were a party of friends and relatives he was conveying to his home for New Year's dinner.

The evidence further discloses that the injury occurred about 9:30 o'clock in the morning and that the weather was extremely foggy. The evidence of appellee tended to show that the fog was so dense at times that he was unable to see the street car track. Appellee testified that he was driving in a northerly direction along said street in a slow trot and that he did not see Appellant's car until he was within some five or ten feet of the same;

that no gong was sounded or other signal given, and that immediately upon said car coming into view said noise whirled to the right to escape said car; that the car struck the front wheel of appellee's wagon, demolishing the axle and throwing appellee to the ground and against appellant's car, thereby causing the injuries for which this suit is brought. The evidence further disclosed that nearly all of the other occupants of the wagon, some ten or twelve in number, were thrown to the ground.

It is appellee's contention that by reason of the snow being piled to each side of appellant's track, he was unable to drive his team to the right of said track, and that the only place he could conveniently drive was in or near the center of the street, and that while so driving, his wagon was struck by appellant's car. Appellee was corroborated by his father-in-law and his brother-in-law who were accompanying him and by several other witnesses, some of whom were with him in the wagon at the time and some of whom were on the street car. Appellee was also corroborated by said witnesses to the effect that no gong was sounded or other signal given of the approach of the car, and that the fog was so dense that it was impossible to see but a short distance. Appellee's witnesses also testified with reference to the ridges of snow on each side of appellant's track and with reference to the speed at which appellee was driving. All of appellee's witnesses testified to the effect that he was driving in a slow trot, or as some of them designated it, at a "little dog trot". On the other hand the evidence

offered on the part of appellant tends to prove that the gong was sounded frequently, but not continuous and that the motorman had shut off the power and was allowing his car to coast at the time the injury occurred. The record, however, discloses that appellant's car moved from ten to thirty feet before it was stopped after having struck appellee's wagon. The testimony of appellant's witnesses further tends to prove that while the snow had been ridged to each side of its track that a large part of the snow had melted and that the ridge was only a few inches wide and from three to five or six inches deep and that there was nothing to hinder appellee from driving to the right of appellant's track.

The evidence further discloses that the street was paved and that the distance from curb to curb was 34 feet 2 inches, and that appellant's track was in the center of the street. The motorman for appellant testified that appellee was driving some ten miles per hour and that he was driving faster than appellant's car was running. No one, however, corroborates the motorman with reference to the speed of appellee's team. The motorman further testified that the fog was so dense that he could only see a short distance in front of him, and that he did not see appellee's team until he got within about 20 or 25 feet of the same.

It is appellant's contention that appellee was not in the exercise of due care for his own safety and that appellant was operating its car without negligence on its part. The evidence is sharply conflicting with reference to whether there was a ridge of snow on each side of appel-

lant's truck of the character that rendered that part of the street unfit to drive on and as to the speed appellee was driving, and as to whether or not any alarm was sounded or other signal given by appellant at the approach of its car. The evidence being conflicting, it was a question of fact for the jury as to whether or not appellee was in the exercise of due care for his own safety prior to and at the time of the injury and as to whether or not appellant was guilty of negligence in the operation of its said car at the time of the injury, and as to whether the negligence on the part of appellant, if it was negligent, was the proximate cause of appellee's injury. We are unable to say that the finding of the jury in this case is against the manifest weight of the evidence and we would, therefore, not be justified in reversing the judgment on that account. *Timers v. C.C.C. & St. L. Ry. Co.* 158 Ill.App.347; *Vandicot v. Bank Bros. Coal & Coke Co.* 158 Ill.App.348; *Chicago City Ry. Co. v. McClain*, 211 Ill. 589.

It is next contended by appellant that the court erred in permitting testimony to be offered by appellee to the effect that no light was on appellant's car, for the reason that the failure to have a light on said car was not charged in the declaration. Objection was made to the testimony when offered and the trial court stated in overruling the objection, that the evidence would be proper as tending to show whether or not appellee was in the exercise of due care for his own safety at the time of the injury, and an instruction was given by the court limiting the evidence to that point alone. So limited we do not think the court erred

in its rulings thereon.

It is next contended by appellant that the court erred in refusing to direct a verdict at the close of appellee's evidence and again at the close of all of the evidence. ~~An~~ instruction to that effect having been tendered by appellant. What we have already said with reference to the character of the testimony in this case discloses that there was evidence in the record offered by appellee fairly tending to prove his declaration. There was, therefore, no error in refusing to direct a verdict for appellant.

It is next contended by appellant that the court erred in refusing to give the 8th and 14th instructions offered by it, and which were refused by the court. Sixteen instructions were given on behalf of appellant, and an examination of these instructions discloses that the jury were fully instructed on every legitimate phase of appellant's case, and that its theory of the case was fully presented to the jury. And an examination of these instructions will further disclose that the matters set forth in the refused instructions so far as proper were covered by other instructions given. The court, did not err in refusing the 8th and 9th instructions tendered by appellant.

No contention is made by appellant that the verdict is excessive, and there being no reversible error in the record the judgment of the trial court will be affirmed.

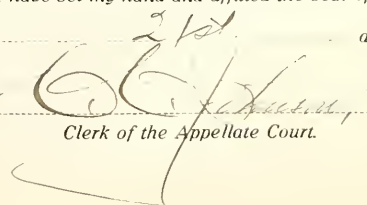
Judgment affirmed.

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court

at Mt. Vernon, this 21st day of April,
A. D. 1917.


Clerk of the Appellate Court.

NOINI

3207

Opinion of the Appellate Court

AT AN APPELLATE COURT, begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March, in the year of our Lord, one thousand nine hundred and seventeen, the same being the 27th day of March, in the year of our Lord, one thousand nine hundred and seventeen.

Present:

Hon. James C. McBride, Presiding Justice.

Hon. Franklin H. Boggs, Justice.

Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the Thirteenth day of April, A. D. 1917, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

Central Funding Company,

Appellant

vs.

No. 40

October Term, 1916.

A. K. Gibson,

Appellee

206 I.A. 236

ERROR TO
APPEAL FROM

Circuit COURT

Liftingham COUNTY

TRIAL JUDGE

HON.

W. B. WRIGHT



Term No. 40 In the Appellate Court Agenda No. 5
of Illinois, Fourth District.
October Term, A. D. 1916.

Central Funding Company,	}	
Appellant,		
vs.		Appeal from Circuit Court of
A. F. Gibson,		Effingham County, Illinois.
Appellee.	}	

Opinion by Peage, J.

On an appeal from a Justice of the Peace a trial was had in the Circuit Court of Effingham County without a jury resulting in a finding and judgment in favor of appellee on a claim of set off for \$5.00 and costs. Appellant prosecutes this appeal for a reversal of said judgment.

The record discloses that on Oct. 4, 1913, appellee and the American Extension University and the Central Funding Co. entered into the following contract:

"I hereby order and agree to accept, carriage prepaid, your complete University Extension Law Course as hereinafter outlined.

It is understood that the course shall consist of-

(a) 100 printed lessons, with quizzes, on the principles of the law,.....(c) 50 printed lessons, with quizzes, on the adjective law, pleading and practice, with special reference to the codes or statutes of any state I may choose - - (e) Supplementary lectures and side lights (d) Subject examinations on the

work covered (e) Unlimited consultation for the full two years (f) A guarantee of complete preparation in law sufficient to pass the legal examinations to practice before the bar of the state chosen. (g) Half yearly examinations, (h) Diploma

In consideration of your acceptance of this application, and of \$1.00, by each to the other in hand paid, the receipt of which is hereby acknowledged, I agree to pay to Central Funding Co., its successors or assigns, at Chicago, Ill., the sum of \$75.00, payable as follows: \$5.00 herewith and the balance at the rate of \$5.00 per month, That this contract is not subject to revocation, nor to any conditions not expressed herein in writing or print; that my failure for 60 days to fulfill its terms shall, at the option of the said Central Funding Co., its successors or assigns, cause the entire unpaid balance to become due and payable on demand..... Signed, A. F. Gibson."

The following stipulation of facts was entered into on the trial:

"Statement of facts in the above entitled cause hereby agreed to by the parties herein, that the contract and note included therein submitted herein was signed by the parties herein according to the terms set out in the agreement, that the said A. F. Gibson chose the state of Illinois as the state in which he desired to pass the legal examination to practice law; that the said A. F. Gibson paid on the said contract the sum of five dollars, and the plaintiff shipped to the said A. F. Gibson part of the printed

lessons with a quizzer and that the plaintiff accepted the contract or order and the defendant refused to accept the lessons and quizzers that had been shipped to him, and notified the plaintiff."

The contract above referred to was the only evidence offered by appellant and the only evidence offered by appellee consisted of the rules governing the admission to the bar of this state as they obtained at the date of the foregoing contract.

There were no propositions of law tendered by either party, and there were no objections made to the evidence offered by either party, so the sole question to be determined on this appeal is whether the finding and judgment of the trial court was against the manifest weight of the evidence. *Green v. Mourigan*, 158 Ill.381; *Robertson v. Ferguson's Est.* 168 Ill. 232.

As we view the record in this case appellant wholly failed to make out a case against appellee for a recovery on the note and contract offered in evidence. It was not stipulated in the contract, nor is it otherwise shown by the evidence, why appellee refused to accept the printed lessons or quizzers, neither is it stipulated, nor is it proven by evidence that appellant was ready, able and willing to give appellee the instructions provided for in the contract. For aught that appears in this record, appellee may have had good reasons for refusing to accept the lessons and quizzers. Appellant is seeking to recover the full amount of the consideration to be paid by appellee under the contract. The law is that before appellant would

be entitled to recover on said contract it must prove by a preponderance of the evidence its ability and readiness to perform the same on its part. *Reebing's Sons' Co. v. Lock Stitch Fence Co.*, 130 Ill. 660. It would seem that after the refusal of appellee to accept the first installment of the lessons and quizzers, appellant made no further offer or tender of performance on its part, nor does it show by the record that it was able, willing and ready to perform.

Where one party to a contract gives notice before the time of performance arrives that he does not intend to perform, the other party may treat such notice as a breach and bring his action, or he may decline to accept such notice as a breach, and may insist that the contract shall continue in force up to the time fixed for its final performance, holding the party refusing to perform responsible for the consequences of such refusal. *Reebing's Sons' Co. v. Lock Stitch Fence Co.* *supra*. *Radish et al v. Young et al*, 108 Ill. 170.

Appellant would not be entitled to recover on the contract and note sued on, on the theory that it had performed its part of the contract, as it made no further effort to perform after receiving said notice and offered no evidence in proof of its ability to perform the same. This would be necessary under the authorities above cited before it would be entitled to recover.

We are, therefore, of the opinion that the court did not err in its findings and judgment, and said judgment will therefore be affirmed.

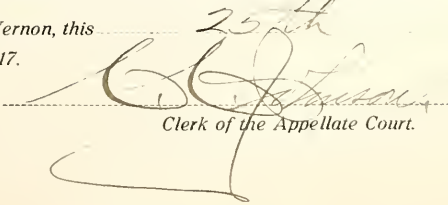
Judgment affirmed.

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court

at Mt. Vernon, this 25th day of April,
A. D. 1917.


Clerk of the Appellate Court.

NOINI

Opinion of the Appellate Court

AT AN APPELLATE COURT, begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March, in the year of our Lord, one thousand nine hundred and seventeen, the same being the 27th day of March, in the year of our Lord, one thousand nine hundred and seventeen.

Present:

Hon. James C. McBride, Presiding Justice.

Hon. Franklin H. Boggs, Justice.

Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the Thirteenth day of April, A. D. 1917, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

206 I.A. 237

Sarah A. Cheatham,

Appellee

ERROR TO
APPEAL FROM

vs.

Circuit

COURT

No. 45

October Term, 1916.

Last St. Louis Railway Co.,

Appellant

St. Clair

COUNTY

TRIAL JUDGE

HON.

W. L. VANDEVENTER



Term No. 45 In the Appellate Court Agenda No. 32
of Illinois, Fourth District.
October Term, A. D. 1916.

Marsh A. Sneatham, Appellee)	
vs.	)	Appeal from Circuit Court
East St. Louis Railway	)	St. Clair County, Illinois.
Company,)	
Appellant)	

Opinion by Boggs, J.

Appellee recovered a verdict and judgment for \$1500. in an action on the case against appellant in the Circuit Court of St. Clair County. The declaration consisted of one count, in which it was charged that appellant was operating an electric street railroad within the city of East St. Louis, and that while appellee was exercising due care and caution for her own safety, was attempting to board said car and while she was upon the lower step thereof, appellant through its servants in charge of said car negligently and carelessly started said car suddenly and with a jerk, whereby plaintiff was thrown from said car upon the pavement of the street, thereby bruising her shoulders, arms, limbs and head. It is also alleged in said declaration that the drum of appellee's ear was injured, thereby affecting her hearing, and also that her back and spine were injured, thereby affecting and injuring her nervous system. A plea of the general issue was filed and trial was had resulting in a verdict and judgment.

ment as above set forth.

The principal ground relied on by appellant for a reversal of the judgment in this case is that the verdict of the jury is against the manifest weight of the evidence. The record discloses that the car in question was proceeding northward on Collinsville Avenue, shortly after the noon hour and had stopped for passengers on the south side of Missouri Avenue, an intersecting street, and had then crossed said street intersection and stopped again on the north side thereof. It was at this point that appellee, while attempting to board said car received her injury. The evidence on the part of appellant tends to show that after the car had made its stop on the south side of Missouri Avenue, the conductor began collecting fares at the rear end of the car, but remained in a position where he had a view of the rear platform and steps of the car; that one or more men boarded the car at the north side of the crossing and that the conductor not observing anyone else in sight, gave two bells as a signal for the car to start; that just as the car started, appellee came up from the rear of the car and took hold of the rear handle bar preparatory to getting on the steps; that as soon as the conductor saw appellee take hold of said handle bar he gave the signal for the car to stop and that it stopped within a distance of from six to fifteen feet.

The evidence on the part of appellant further tends to show that the car started with a slow easy motion and without any jerk, and that it was equipped with a special device which made it impossible to start the car in any other manner. On the other hand, appellee testified; "I was going north on the defendant's Stock Yard car on Collins-

ville Avenue. I got on the car at the northeast corner of Collinsville and Missouri Avenues, a regular stopping place to go ^{to} the stock yards. As I went to get on the car I had my pocketbook on my right arm and two nickels in this hand. I got aboard with my hands and landed my right foot on the bottom step of the car and went to raise the other foot to the platform. Just as I got it off the ground the car started with such a jerk that it threw my left foot to the ground, and pulled me off the other foot so quick it broke my right hand loose. I held with my left hand as tight as I could. When I got my foot down it broke my hold and I fell on the pavement." Walter Newton a witness on behalf of appellee testified "that he was near the corner of Collinsville and Missouri Avenues when appellee was hurt; that she went to step and as she did the car started --whether her foot hit the step or not I couldn't tell." William Barnett, another witness on the part of appellee testified, "I saw her have her hand on the handle of the car and the car was moving slowly-- then she fell--I don't know whether she was on the step or not. I know she fell. She just kind of squatted down."

While the evidence is conflicting and there is somewhat greater number of witnesses testified on behalf of appellant than on behalf of appellee, at the same time, we are not able to say that the jury were not warranted in returning a verdict in favor of appellee. The facts and circumstances surrounding the case, we think, tend rather to corroborate the theory of appellee as to how she received her injury than the theory advanced by appellant. It is admitted by appellant's conductor that he left the platform and en-

tered the car and began to collect fares while the car was crossing Missouri Avenue; that the car stopped at the north side of Missouri Avenue and that certain passengers entered the car at that point while he was inside the car collecting fares, and that without going to the platform he gave the signal while inside the car for the car to start. The evidence tends to show that someone--probably a passenger--had stated "all right" and that upon this announcement being made appellant's conductor gave the signal starting the car. It was at this time that appellee attempted to board said car and received her injury. The conductor for appellant further testified on cross examination that it was his duty to be on the rear platform of the car when it stopped to receive passengers. Under the evidence we are, therefore, not able to say that the verdict is against its manifest weight or that the injury did not occur through the negligence of appellant and its servants as contended by appellee.

Where the evidence is conflicting the verdict will not be disturbed unless manifestly against the weight of the evidence. *Adams vs. Duver*, 80 Ill. 522; *McIntosh v. Town of Antioch* 109 Ill. App. 291.

It is next contended by appellant that the verdict is excessive. The evidence disclosed that appellee was about 45 years of age at the time of the injury; that she was a large fleshy woman, weighing something like 150 pounds; that while prior to this injury she had suffered with stomach trouble and had had a rupture of the walls of the abdomen she notwithstanding had been able to conduct a

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lunch counter at one of appellant's store. Since this injury appellee has never walked, has had to sit in a chair and has been unable to do any work except such work as she could do while sitting.

The evidence further discloses that upon receiving her injury she was removed to the hospital in an ambulance where she remained some four or five weeks and was then removed to her home where she has been unable to walk or do any work, except as above stated.

The evidence also discloses that after said injury appellee had several severe ruptures of the abdominal wall. The evidence, however, is uncertain as to whether those ruptures existed prior to the injury complained of or whether said ruptures were the result of her injuries. Appellee admitted she had one rupture prior to her injury, but insists that the remaining ruptures were the result of the injury. Appellee also insists, that she received a severe injury on her head and side, and that she has suffered continuously with her right ear. Appellee's contention being that the car drum was hurt at the time of her injury. Whether or not appellee's injuries were as severe as contended by her, the evidence is clear that they were severe enough to incapacitate her from doing household or from walking, and that they confined her to the hospital for some four weeks. We are therefore unable to state that the verdict in this case is so excessive as to require a reversal for that reason.

It is for the jury to say in cases of this character under the evidence the amount the injured person is entitled to recover, and unless the evidence discloses that the jury

were governed by prejudice or passion in fixing the amount of the damages this court should not disturb the verdict for that reason alone. *Parker vs. Smith*, 143 Ill. 410; *North Chicago Street R.R. Co. vs. Zeiger*, 125 Ill. 17.

In *North Chicago Street R.R. Co. v. Zeiger*, *supra*, the Supreme Court in passing on this question quoted the language of the Appellate Court in which it was stated that, "An appellate tribunal will not disturb a verdict in a suit to recover for personal injuries, merely because it would have assessed the damages at a less amount if it had been sitting as a jury. It is only where the verdict in such cases is so out of the way as to justify an inference that it is the result of partiality, prejudice or passion, that the duty of an appellate court arises to set aside the verdict..... The case seems to have been fairly and deliberately tried and full consideration given to every defense the defendant interposed, and though the verdict is full in amount, it cannot be said to be palpably wrong." These observations, we think, to be applicable in this case.

It is further insisted by appellant that the court erred in its ruling on exceptions taken by appellant to remarks made by counsel for appellee, in the closing argument. In examination of the record disclosed that in most instances where a ruling of the court was insisted upon, the court sustained the objections of counsel for appellant to the remarks that were being made by appellee's counsel. While we are of the opinion that the remarks of counsel were not all warranted by the evidence, and that the court should have restricted counsel more than it did, at the same time,

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we do not believe that appellant was seriously prejudiced by any ruling of the trial court in connection with objections made to the argument of appellee's counsel.

A motion was made by appellant at the close of appellee's evidence and then again at the close of all the evidence, to direct a verdict in favor of appellant. What we have already said in connection with the contention that the verdict was against the manifest weight of the evidence sufficiently covers this assignment of error.

No complaint is made as to instructions.

Finding no reversible error in this record, the judgment of the trial court will be affirmed.

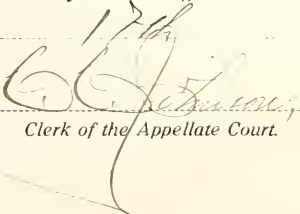
Judgment affirmed.

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court

at Mt. Vernon, this 12th day of April,
A. D. 1917.


Clerk of the Appellate Court.

Opinion of the Appellate Court

AT AN APPELLATE COURT, begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March, in the year of our Lord, one thousand nine hundred and seventeen, the same being the 27th day of March, in the year of our Lord, one thousand nine hundred and seventeen.

Present:

Hon. James C. McBride, Presiding Justice.

Hon. Franklin H. Boggs, Justice.

Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the Thirteenth day of April, A. D. 1917, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

206 I.A. 239

Charles J. Smith, Admr.

Appellee

~~ERROR TO~~
APPEAL FROM

vs.

Circuit

COURT

No. 51

October Term, 1916.

L. S. Smith, et al,

Appellants

Perry

COUNTY

TRIAL JUDGE

HON.

LOUIS DEPREUTER



Term No. 51

In the Appellate Court

January 17, 1915

of Illinois, Fourth District.

October Term, A. D. 1914.

Charles J. Smith, Administrator,)

Appellee)

vs.)

L. S. Smith, C. J. Bachman and)

H. C. Miller,)

Appellants)

Appeal from Circuit Court

Jerry County, Ill.

Opinion by Logan, J.

This appeal is prosecuted by appellants, designated in the record as Trustees of the estate of Henry Horn, deceased, to reverse a judgment rendered by the Circuit Court of Jerry County, in favor of appellee as administrator of the estate of John Smith, deceased, and against the estate of said Henry Horn, deceased. It was stipulated by the parties on the trial in the Circuit Court that on the 18th day of December, 1914, executors of the will of Henry Horn, deceased were appointed by the probate court of Jerry County, and that thereafter on the 20th day of December, 1914, the claim in question was filed against said estate, being more than one year after the issuance of said letters of executorship.

It was further stipulated by said parties that at the May Term 1915 of the Circuit Court of Jerry County, a petition was filed by the creditors of said estate of Henry Horn, deceased, for the purpose of removing the administration of

of said estate from the County Court to the Circuit Court and that on the 19th day of May, 1916, a decree was entered removing said executors appointed by the County Court and appointing W.S. Smith, C.J. Bachman and M.E. Miller, appellants herein, as Trustees of said estate of Henry Barn, that the said trustees thereafter filed bond and qualified as such, and have since been in charge of said estate. The record further discloses that after the stipulation in question was made with reference to the time of the filing of said claim, the claim itself which had been lost or mislaid was found, and it appears from an examination of the claim that it was sworn to on the 15th day of January 1916, instead of the 20th day of December, 1915, and was not filed in court until the 9th day of May 1916.

The record further discloses that no pleadings were filed in connection with the hearing on said claim and that the claim filed was in the usual form in which claims are filed in the Probate Court. A jury was waived by the parties and a trial had by the Court. Appellant objected to the claim in question on the special ground that it had not been filed within one year after the granting of letters of executorship by the County Court of Perry County. The trial court admitted testimony on the part of appellee to the effect that the reason he had not filed said claim within one year was because he had been advised by counsel that he would have one year for the filing of the bond after the administration of said estate had been transferred to the Circuit Court and for the further reason that he had been physically ill and unable to look after his business. The

evidence, however, with reference to the ill health of appellee was confined to the last few months immediately preceding the filing of said claim. The trial court found the issues in favor of appellee and rendered judgment generally against said estate of Henry Horn, deceased, for \$1175.37, to be paid in due course of administration.

The principal question to be determined in this case is whether or not said claim should be allowed generally against the estate of Henry Horn deceased or whether judgment should have been rendered against said estate to be paid out of assets not inventoried or accounted for by the executors or trustees of said estate. In other words, the question to be determined is whether or not the claim in question was barred by reason of the fact that it was not filed within one year from the issuance of letters of executorship by the County Court of Henry County.

Paragraph 7 of Sec. 7, Chapter 3 of the revised Statutes provides among other things: "that all demands not exhibited within one year as aforesaid shall be forever barred unless the creditors shall file their estate of the deceased not inventoried or accounted for by the executor or administrator, in which case their claims shall be paid pro rata out of each subsequently discovered estate."

Appellee concedes this to be the law and that it should be given effect in this proceeding, except for the fact that the administration of said estate of Henry Horn deceased was transferred from the County Court to the equity

side of the Circuit Court of said Perry County, it being contended by appellant that the administration of said estate being in a court of equity at the time said claim was filed, it would not be governed by the above mentioned statute. In other words, that a court of equity will not give effect to the statute of limitations, but will be governed by rules of practice obtainable only in that court. The law, however, is exactly to the contrary and no principle is better established than that equity does regard and give effect to the statute of limitations. Hancock vs. Barker, 86 Ill. 448; Bonney v. Stoughton, 122 Ill. 656; Boone v. Salenour, 145 Ill. 305.

The law further is that where a remedy is afforded and the party neglects to avail of it, equity will not assist him after his rights have been barred by the statute of limitations. Harris v. Douglas, 84 Ill. 450; Blanchard v. Williamson, 70 Ill. 647; Strauss v. Phillips, 183 Ill. 3; Morse v. Pacific Ry. Co. 181, Ill. 300.

In Blanchard v. Williamson, supra, at page 661 the court says: "It is an elementary principle, that where the law affords a party an adequate remedy, he must pursue it. In this case the claimant was under no legal disability, and there was nothing to prevent him from presenting his claim against the estate, and in procuring its allowance"..... "The law may now be regarded as settled, in this state, at least, a court of equity will not assume jurisdiction until the ~~claim~~ claimant shall have exhausted his claim and has it allowed in the County Court, and then, if any special reasons that may be deemed sufficient can be assigned why that court

cannot afford the requisite relief, equity will assist him, but not otherwise. "Citing, *Langston v. Proctor*, 12 Ill. 551. *Creeland, Exr. v. Dwyer*, 35 Ill. 256.

In *Lorfe v. Pacific Ry. Co.* supra page 100, the court in discussing the effect of filing a claim against an estate while in process of administration in a court of equity says: "It is also said that equity had taken jurisdiction of the subject matter and would retain its jurisdiction until final determination of the controversy, and, therefore, the claim need not be filed in the county court. That is true. The Circuit Court had a right to retain its jurisdiction; but that does not affect the question as to what assets the claim should be paid. It is immaterial in which court the proceeding is had if it is a court of competent jurisdiction, and the provision of the statute is not a bar to the revival of the suit or the commencement or prosecution of any suit, but is only a limitation upon the right to participate in assets which have been inventoried and which the law requires to be distributed to heirs or devisees. And the court held in that case that the claim in question not having been presented within the time provided by the statute, the claimant could not participate in the assets inventoried but must depend on subsequently discovered estate or assets not inventoried. This latter case practically decided the question involved in this case and is squarely against the contention of appellee. We do not regard the testimony of appellee touching the reason why he did not file the claim as in any wise offering a legal excuse. One here who had followed the advice of counsel would not have his firm

the effect of the statute, neither would the fact that shortly before the end of the year after letters of administration were issued by the county court he may have been physically ill be an excuse for failing to present his claim within the time fixed by statute.

It is next contended by appellee that in order to raise the question as to the allowance of said claim against the estate of said Henry Horn, deceased, appellant should have filed a plea of the Statute of Limitations in the trial court. As stated above, there were no pleadings filed by any of said parties so it was unnecessary for appellant to file a plea of the Statute of Limitations, there was no declaration filed to which said plea could join. The law further is that in the defence of claims against an estate it is not necessary that the statute of limitations be specially pleaded, though relied upon as a defense. *Thompson v. Lee*, 48 Ill. 118; *Thorp v. Mooney*, Admr. 15 Ill. 111; *Case vs. Curwell*, 30 Ill. App. 449.

No question was made with reference to the legality of the removal of the administration of the estate of Henry Horn deceased from the County Court of Henry County to the Circuit Court as all parties seem to concede that the Circuit Court had jurisdiction of this estate. While the record does not fully disclose just why the estate was transferred, for the purpose of this hearing we will assume that the Circuit Court had jurisdiction of this estate. We hold the judgment in this case erroneous for the reason that the claim in question was not filed within one year from granting of letters of administration by said County Court. The judgment

should have been limited in its effect to subsequently discovered and inventoried estate. *Peacock v. Haven*, 100 U.S. 23 111. 23.

For the reasons above set forth the judgment of the Circuit Court will be reversed and remanded with directions to modify the judgment rendered in said case so as to make it apply solely to subsequently discovered and inventoried estate.

Reversed and remanded with directions.

Not to be reported in full.

should have been included in the report of the committee.

Respectfully,
Yours truly,
J. H. P.

1871.

The committee have had the honor to

receive from the committee of the House of Representatives

the report of the committee on the subject of the

proposed amendment to the Constitution of the United States

and have the honor to acknowledge the receipt of the same.

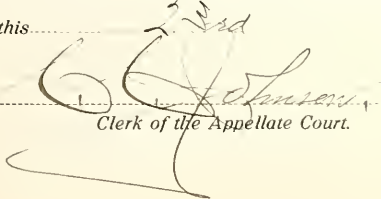
Very respectfully,
J. H. P.

1871.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court

at Mt. Vernon, this 2nd day of April, A. D. 1917.


Clerk of the Appellate Court.

NOIN

neg 3111

Opinion of the Appellate Court

AT AN APPELLATE COURT, begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March, in the year of our Lord, one thousand nine hundred and seventeen, the same being the 27th day of March, in the year of our Lord, one thousand nine hundred and seventeen.

Present:

Hon. James C. McBride, Presiding Justice.

Hon. Franklin H. Boggs, Justice.

Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the Thirteenth day of April, A. D. 1917, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

Otto J. Unterbrink,

Appellee

vs.

No. 56

October Term, 1916.

Horatio J. Bowman, Trustee, etc.

Appellant

206 I.A. 253

ERROR TO
APPEAL FROM

Circuit

COURT

Madison

COUNTY

TRIAL JUDGE

HON.

J. P. GILHEAL

Term No. 56. In the Appellate Court Cause No. 74
of Illinois, Fourth District.
October Term, A. D. 1916.

Otto J. Unterbrink, Appellee	}	
vs.		
City of Alton (not appealing)		Appellate Circuit Court
and Horatio J. Bowman, Trustee		Madison County, Illinois.
of the estate of Simon Lyder, and		
insane person, Appellant	}	

Opinion by Boggs, J.

An action on the case was brought in the Circuit Court of Madison County by appellee against the City of Alton and appellant, Horatio J. Bowman, as Trustee of the estate of Simon Lyder an insane person, to recover damages for personal injuries alleged to have been sustained by appellee from falling into a coal-hole in the sidewalk in said city.

At the close of appellee's evidence, the Court instructed the jury to find the City of Alton not guilty. The cause thereafter proceeded to trial against appellant, only. The declaration contained two counts designated as the amended count and the second or additional count. The amended count so far as appellant is concerned charges in substance that on and prior to March 12, 1914, appellant as said trustee was possessed of and in control of lot 1 of Block 7 in said City of Alton, abutting on the north side of Second street;

that on said date and for a long time prior thereto appellant suffered and permitted a coal-hole to be and remain in the sidewalk in front of the said premises; that as was well known, or by reasonable diligence might have been known the iron cover thereon was loose and not securely fastened; that on March 10, 1914, appellee, while in the exercise of ordinary care for his own safety, stepped upon said iron cover, whereupon the same tilted causing him to fall and he thereby sustained serious and permanent injuries.

The second or additional count contains similar allegations to said amended count, and, in addition thereto, alleges that prior to March 10, 1914, appellant, Trustee, etc. had rented the lower floor and basement of the eastern portion of the said premises to one C. M. Langham, as tenant; that at the time said premises were so rented said coal-hole was in a dangerous condition and a nuisance, and had been such for a long time prior to said leasing, knowledge of which condition was known, or by reasonable diligence could have been known by appellant. A plea of the general issue and a special plea denying possession and control of the premises at the time of the accident was filed by appellant.

A trial was had resulting in a verdict and judgment in favor of appellee for \$2000.00. To reverse said judgment this appeal is prosecuted.

The record discloses that appellant as trustee had charge and management of the premises in question, consisting of a two-story building, known as 604 East Second Street, and that on January 15, 1913, said premises were leased to one C. M. Langham.

Appurtenant to the premises and used in connection therewith is a coal-hole from two to two and one-half feet in diameter in the sidewalk along Second Street directly in front of the premises. Said hole is covered by an iron lid weighing about forty pounds, and which fitted in an iron rim or flange inside of the opening, and about one and three-quarters to two inches wide and about three-quarters of an inch from the top.

On March 14, 1914, appellee while passing along the sidewalk in front of said premises stepped on the cover over said coal-hole, when the same tipped or turned in some way, causing him to fall and receive the injuries for which this suit is brought.

It is first contended by appellant for a reversal of said judgment that the verdict is against the manifest weight of the evidence. The evidence discloses that prior to the renting of said premises to Langham, different persons had stepped in this coal-hole by reason of the fact that the lid was not securely fastened, notice of which had been brought to the attention of appellant. This evidence was objected to by appellant, and it is claimed that its admission was error. We hold, however, that the court did not err in the admission of this evidence for the reason that it tended to show the unsafe, dangerous or defective condition of this coal-hole. *Bloomington v. Legg*, 151 Ill. 3. *East Chicago Masonic Association v. Colon*, 192 Ill. 117.

In the case of *City of Bloomington v. Legg*, supra, the court at page 13, says: "This court has seen such evidence competent, not for the purpose of showing independent

acts of negligence, but as tending to show the common cause of these accidents is a dangerous, and if true, where an issue is made as to the safety of any ordinary or work of man's construction which is for practical use, the manner in which it has served that purpose, when put to that use, would be a matter material to the issue, and ordinary experience of that practical use, and the effect of such use, bear directly upon such issue. It no more presents a collateral issue than any other evidence that calls for a reply which bears on the main issue. Such evidence is held competent by the weight of authority. (Citing, *Ottawa Gas Light & Coke Co., vs. Croker*, 73 Ill. 346; *City of Chicago v. Powers*, Admx. 42 Ill. 170; *City of Port Wayne v. Coombs, et al*, 107 Ind. 71; *City of Topeka v. Sherwood*, 39 Kan. 690; *Dist. of Columbia, v. Arnes*, 107 U.S. 511; *Darling v. Westmoreland*, 50 W. Va. 471. ... The frequency of such accidents would create a presumption of knowledge, and would be material to the question of diligence used to obviate the cause of injury."

Counsel for appellant, however, contends that the above authorities do not apply in this case for the alleged reason that the evidence does not show that the coal hole at the time the premises in question were rented to Langham, was in the same condition that it was in at the time these prior accidents occurred. The evidence on this point is conflicting. The record discloses that sometime prior to the renting of the premises to Langham, another tenant of appellant had called his, appellant's attention to the fact that this coal hole was in a dangerous condition, and that persons

were stepping into the hole on that account. In reply thereto, appellant offered evidence to the effect that he caused a wire to be attached to the lid to said coal-hole and that with a stick put in the loop at the top of this wire it was twisted up in such a way as to bring the stick snug against the bottom of the coal-hole, thereby securing the lid in such manner that it could not be lifted. The evidence on the part of appellee, however, tended to show that the lid in question was too small for the coal-hole and that it could be slipped to one side so as to leave a crack between the outer rim of the lid and the lower edge of the rim or flange, thereby rendering the said hole notwithstanding the above appliance.

The evidence further disclosed that this same tenant had stated to appellant since said wire was being attached to the lid to said coal-hole that the coal-hole was again in a defective or unsafe condition and that it should be fixed.

✓ The evidence being conflicting as to whether or not the coal-hole in question was in an unsafe, defective and dangerous condition at the time said premises were rented to Langham, it was therefore a question for the jury as to whether or not appellant was guilty of negligence or not, and their finding on that question should, not or should not, be set aside by this court unless the same is against the substantial weight of the evidence, and this we are unable to say. *Threlkett v. Donk Bros. Coal & Coke Co.*, 103 App. 543.

It is next contended by appellant that the court erred in refusing to direct a verdict in favor of appellant, an instruction to that effect having been submitted at the close of appellee's evidence and upon all the evidence of all

the evidence in the case. That we have already said in regard to the character of the evidence in the record discloses that the same fairly tended to prove the allegations of the declaration and the court to refuse did not err in said ruling. It is next contended by appellant that the court erred in giving the two instructions tendered on behalf of appellee. The first instruction being as follows: "The court instructs the jury that if they find from the preponderance of the evidence that the defendant is guilty of the negligence charged against him in either count of the declaration, and that the plaintiff suffered damage on account of such negligence as charged in the declaration, and that the plaintiff at the time of the injury complained of, was in the exercise of ordinary care for his own safety, then and in such case, your verdict should be for the plaintiff." It is insisted by appellant that this instruction allows appellee to recover on either count of his declaration and that there was no evidence to sustain the first count thereof.

Without going into the evidence in detail, an examination thereof will disclose that it was a controverted question of fact as to whether or not the tenant, Langha, under his lease from appellant had the exclusive possession of the basement including the excavation under the sidewalk where the coal-hole in question was located. The language of the lease with reference to the description of the property being as follows: "The following describes property situated in the City of Alton, Block 7 (city proper) on the north side of Second street and also known as 824 West

Second street. This store room to be used for the purpose of carrying a general line of wall paper, etc. ready mixed paint and paint supplies." The evidence discloses that the building located on this lot was a two story building with a basement, which extended out under the sidewalk in front of the building. Appellant insists that his lease in question gave said tenant the exclusive possession and control of said basement. Langham, however, testified in effect, that his lease did not include the basement and that he made no use thereof except to have the box of coal thrown in through this coal-hole. Both sides conceded that the lease did not include the second story of the said building. The evidence discloses that in order to reach the basement in question, you had to go out of said building and go down a pair of stairs from the outside and it is uncertain as to whether or not the stairway leading to the basement was for the exclusive use of the property rented by Langham or whether it was to be used by other occupants of the building. To say the least, the evidence on the question as to whether Langham had exclusive possession of the basement was conflicting. If he did not have such exclusive control, or if his lease did not include said basement, then appellant would not be relieved from his duty to see that said coal-hole was maintained in a safe condition. He held, therefore, under the evidence in the case the court did not err in giving appellee's first instruction.

Appellant next insists that the second instruction is based on an incorrect theory. He does not think that it is. However, thinking he, as appellant, is entitled to

lant's instructions discloses that several of them are based on the same theory, he is therefore, not in a position to make complaint.

Lastly it is urged by appellant that the verdict is excessive. The evidence in the record is not clear as to whether or not the injuries received by appellee are permanent. However, the record discloses that the injuries were severe, affecting appellee's kidneys and nervous system. Appellee was reduced in weight about thirty pounds since the time of the injury. Appellee is a mechanic tailor and when on full pay earns twenty dollars per week. In addition thereto prior to his injury he was making two hundred to two hundred and twenty dollars per year playing in a band. The evidence is to the effect that appellee by reason of said injuries was incapacitated for any work whatever for five weeks and for five months he was only able to earn ten dollars per week, and that he has not been able to play in the band since said injury on account of his breathing being affected. The evidence further discloses that appellee has been obliged to expend or become liable for something over \$1000 in endeavoring to be cured of his injuries. That at the time of the trial, about two years since the injury, he was still suffering therefore, though able to do his work. While the verdict is a substantial one, it is not so excessive as to warrant us in reversing the judgment of the jury. The question of damages in an action for personal injuries is a question for the jury, and unless this court can say that in assessing the damages the jury have been overcome by prejudice or passion, we are not warranted in setting the verdict

aside on that ground. North Chicago Street R.R. Co. v.
Seiger 182 Ill. 95; Foster v. Fritz, 183 Ill. App. 485.

Finding no reversible error in the record, the
judgment of the trial court will be affirmed.

Judgment affirmed.

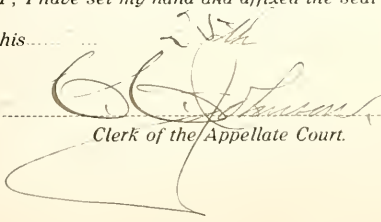
Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court

at Mt. Vernon, this
A. D. 1917.

25th day of April,


Clerk of the Appellate Court.

NOIN

3113

Opinion of the Appellate Court

AT AN APPELLATE COURT, begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March, in the year of our Lord, one thousand nine hundred and seventeen, the same being the 27th day of March, in the year of our Lord, one thousand nine hundred and seventeen.

Present:

Hon. James C. McBride, Presiding Justice.

Hon. Franklin H. Boggs, Justice.

Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the Thirteenth day of April, A. D. 1917, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

West Frankfort Bank & Trust Co.,

Appellee

vs.

No. 71

October Term, 1916.

Joe Baretti et al,

Appellants

206 I.A. 261

ERROR TO
APPEAL FROM

Circuit

COURT

Franklin

COUNTY

TRIAL JUDGE

HON.

CHARLES H. WILDER



Term No. 71. In the Appellate Court Agenda 22.30
of Illinois, Fourth District.
October Term, 1918.

West Frankfort Bank	}	Appellate	}	Appeal from Circuit Court
& Trust Company,				
vs.				
Joe Barretti and Barney	}	Appellants	}	of Franklin County, Ill.
Tonazzi,				

Opinion by Logan, J.

An action in assumpsit was instituted by appellee, West Frankfort Bank & Trust Co. against appellants in the Circuit Court of Franklin County to recover the sum of \$501.30 alleged to be owing to appellee, and, by virtue of a deposit of that amount having been entered through mistake on the books of appellee to the credit of appellants.

The declaration filed by appellee consisted of two common counts, to which declaration appellants entered a plea of the general issue. A trial was had resulting in a verdict and judgment in favor of appellee for the amount of said deposit. To reverse said judgment this appeal is prosecuted.

It is first contended by appellants for a reversal of said cause that the verdict of the jury is against the manifest weight of the evidence. The record discloses that appellants were engaged in the saloon business in West Frank-

fort under the firm name of Barretti and Bonazzi; that they were patrons of appellee, bank, and had been for sometime prior to the transaction in question. Appellants carried what is designated as an active account, making frequent deposits and drawing numerous checks. There was also in said city of West Frankfort a firm of Italian doing business as Bertoti and Belero, who carried in appellee's bank an inactive account, consisting of the funds of an Italian Lodge. On November 28, 1913, one of the firm of Bertoti and Belero made a deposit in said bank, of \$501.30. No credit was given said Bertoti and Belero on the books of appellee for this deposit.

The record further discloses that the bookkeeper in appellee's bank made an entry on said date on the depositor's ledger giving credit to appellants for said amount of \$501.30. The attention of the officers of the bank was not called to the fact that the firm of Bertoti and Belero had not received credit on the books of the bank for the deposit made by them until about October 1, 1914, more than ten months after the deposit had been made. In June 1914, appellants having sold out their business and having dissolved partnership, closed their account in said bank, and checked out the balance to their credit. The record further discloses that a credit of \$501.30 had been given appellants on their bank book as of the date of Nov. 28, 1913.

It is insisted by appellee that credit for the deposit made by Bertoti and Belero was erroneously given to appellants, and that this was occasioned by reason of the fact that Duncan, its then bookkeeper who had only been in its

employ about thirty days was unfamiliar with the names of its customers and the firm name of appellants being somewhat similar to the firm name of Bertoti and Molero, said bookkeeper unwittingly gave appellants credit for said deposit. The account of Bertoti and Molero being an inactive one, is given as a reason why said error was not discovered until nearly a year after the deposit was made and about four or five months after appellants had closed their account. It was not until said firm of Bertoti and Molero applied to appellee, Bank, for the amount of their deposit ten months after same was made, that the error was discovered.

The evidence also discloses that an original deposit slip, dated Nov. 28, 1913, was found in the files of said bank made in the handwriting of W.A. Kelley, its cashier, crediting Bertoti and Molero with the amount of said deposit. The record also discloses that Jones, the bookkeeper who credited appellants with a deposit of \$31.35 on Nov. 28, 1913, also made an entry on the pass book of appellants as of the date of Nov. 28, 1913, for said amount. It being the contention of appellee's witnesses that this deposit entry was made on the pass book of appellants by said bookkeeper at the end of the month of November when he was balancing the pass book of appellants, and that said entry on said pass book was made by said bookkeeper by reason of said credit appearing on the books of appellee to the credit of appellants. W.A. Kelley, the cashier in appellee, Bank, testified that he had a personal recollection of the deposit having been made by the firm of Bertoti and Molero and positively identified the deposit slip as being in his handwriting and as a part of

that transaction. The record also discloses that appellant Lip was found giving credit to appellants for a deposit said date. On the other hand appellants contend that one or the other of them made a deposit of said amount of \$511.30 on Nov. 28, 1913, but as to which one of them made the deposit, they are unable to say, and as to whether the item was made up of checks or cash they were unable to state. Appellants took the witness stand in their own behalf but neither of them would undertake to state that they individually had made the deposit, but they insisted that a deposit of that amount was made by one of them, either by checks or in cash. They were, however, in circumstances in connection with the transaction tending to corroborate the testimony of appellants other than the entry appearing on the ledger of the bank giving credit to appellants for said amount and the entry in appellant's pass book.

While the evidence in the case is conflicting, in our judgment the preponderance of the evidence supports the verdict of the jury. Beyond any controversy, the testimony in the case clearly discloses that a deposit of \$511.30 was made by Bertoti and Molero on Nov. 26, 1913, and that those parties received no credit therefor on the books of said bank. The evidence also clearly discloses that there was only one deposit of \$511.30 made on said date. The evidence further is that if there had been two deposits of said amount made on November 26, 1913, and only one of them had been entered on the books of the bank, that the bank's books would not have balanced, and the error would have been at once discovered. We see no reason for disturbing the verdict, as in our judgment it is clearly supported by the preponderance

ance of the evidence.

There were no instructions tendered by either side. The only instruction given was as to the form of the verdict.

After the motion for a new trial was overruled, a motion in arrest of judgment was made by appellants which was also overruled, and the ruling of the court thereon is assigned as error. The contention of appellants being that a recovery cannot be had on the common count. This objection was not made during the trial of the cause, nor until the motion in arrest of judgment. We fail to perceive any merit in this contention. Money paid by one to another by mutual mistake of facts may be recovered back in an action of assumpsit under the account for money had and received. *Wolf. Exr. v. Caird, et al*, 123 Ill. 585; *Lawrence v. Lux*, 175 Ill. 439; *Gordon v. Johnson*, 166 Ill. 51.

Assumpsit for money had and received may be maintained whenever the defendant has obtained money belonging to the plaintiff which in equity and good conscience he has no right to maintain. As in such cases the law implies a promise to pay. *First National Bank of Springfield v. Cotton*, 172 Ill. 625.

It is also claimed by appellants that the court erred in admitting the deposit slip in evidence showing a deposit made by Bertotti and Colero, as above set forth. Said evidence was admissible, being a part of the res gestae of the transaction, and the court did not err in regard thereto. *Monroe v. Snow*, 131 Ill. 125; *McLean Co. Bank v. Mitchell*, 88 Ill. 52; *Higgins v. Wilson*, 123 Ill. App. 275.

Finding no reversible error in the record the judgment of the Circuit Court will be affirmed.

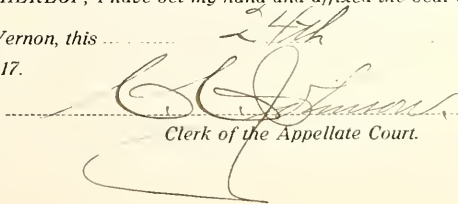
Affirmed.

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court

at Mt. Vernon, this 24th day of April,
A. D. 1917.


Clerk of the Appellate Court.

Opinion of the Appellate Court

AT AN APPELLATE COURT, begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March, in the year of our Lord, one thousand nine hundred and seventeen, the same being the 27th day of March, in the year of our Lord, one thousand nine hundred and seventeen.

Present:

Hon. James C. McBride, Presiding Justice.

Hon. Franklin H. Boggs, Justice.

Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the Thirteenth day of April, A. D. 1917, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an *OPINION* in the words and figures following:

M. E. Thorne,

Appellee

vs.

No. 74

October Term, 1916.

Southern Illinois Railway &
Power Co.,

Appellant

206 I.A. 262

ERROR TO
APPEAL FROM

Circuit

COURT

Saline

COUNTY

TRIAL JUDGE

HON.

A. W. LEWIS



Term No. 74.

In the Appellate Court

January 1914

of Illinois, Fourth District.

October Term, A. D. 1913.

M. E. Thorne, Appellee

vs.

Northern Illinois Railway

& Power Company,

Appellant

Appeal from Circuit Court

Saline County, Ill.

Opinion by Rogers, J.

Appellee instituted suit in a Justice Court of Saline County to recover damages for the killing of her cow. A trial was had in the justice court resulting in a judgment in favor of appellee. Appellant prayed an appeal to the Circuit Court of said County where said cause was tried, resulting in a verdict and judgment in favor of appellee for \$75.00. Appellant prosecutes this appeal.

The evidence discloses that appellant operated an electric interurban along the street in the village of Carrierville, adjacent to appellee's premises. Appellee's husband tied the cow in question with a long rope to a tree in such a position that the cow could go from appellee's premises to the adjacent street and on to the track of appellant's right-of-way. The premises of appellee was some three feet higher than the grade of the street, there being an embankment of that height between the tracks of appellant, railroad, and appellee's lot. The distance between said embankment

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and the north rail of appellant's track was about 7 feet. On the morning of the injury appellee's cow was either standing or lying between said embankment and the north rail of said track. One of appellant's cars was approaching from the east at a speed from 8 to 12 miles per hour. The motorman on said car saw the cow some distance ahead, cut off the power of said car and applied the air brake. He then released the brake and permitted the car to coast toward the cow until within some six or eight feet of her, when she turned or backed on to the track, was struck by the car and her hip was broken. The motorman immediately applied the brake, stopped the car within about fifty feet from the place where the cow was struck. The injury was of such a character as to necessitate the killing of the cow.

It is first urged by appellant for a reversal of said judgment that the court erred in giving to the jury the following instruction tendered by appellee. "The court instructs the jury that even though you may believe from the evidence that the plaintiff permitted the cow in question to be tied in the front yard with a rope of sufficient length that the cow could go onto or near the track of the defendant, this, in law, would not amount to such contributory negligence that would prevent a recovery in this case, provided you further believe from a preponderance of the evidence, that the plaintiff is otherwise entitled to recover, but the jury may take into consideration all of the facts and circumstances shown in evidence in making up your verdict."

This instruction, we think, is clearly erroneous for the reason it takes from the jury the question of contributory

against the manifest weight of the evidence, and no other case will have to be tried by another jury on that and express any opinion with reference thereto.

Great reliance was placed by appellee on the case of *U.C. v. Middleworth*, 46 Ill. 494, in arguing that the degree of care that must be exercised by the railroad, in this case. Appellee quoting from the opinion in said case, page 4, used the following language: "To determine how the animals got upon the track in injury to them could have been avoided by the exercise of ordinary care and diligence, that degree of care and diligence should have been observed."

In the case of *U.C. v. Bogue*, 140 Ill. page 578, the court at page 588 in discussing the liability of a Railroad Company for injury to trespassing animals held that the obligation of the railroad company to avoid injury to trespassing animals is no greater than it is to trespassing individuals, and commented on the case of *U.C. v. Middleworth*, 46 Ill. 494, and says: "So far as the rule there announced (referring to the rule laid down in *U.C. v. Middleworth*) imposed upon railroads the duty to anticipate the presence of trespassers and to be in the constant exercise of vigilance to discover them, so as to make the breach of that duty a ground for recovery by the trespasser, said decision is not in harmony with the general current of authority, nor with what has been said by this court in its more recent decisions."

For the error in the giving and refusal of instructions as above set forth the judgment will be reversed and the cause will be remanded.


Reversed and remanded.

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court

at Mt. Vernon, this.....20th..... day of April,
A. D. 1917.


Clerk of the Appellate Court.

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Opinion of the Appellate Court

AT AN APPELLATE COURT, begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March, in the year of our Lord, one thousand nine hundred and seventeen, the same being the 27th day of March, in the year of our Lord, one thousand nine hundred and seventeen.

Present:

Hon. James C. McBride, Presiding Justice.

Hon. Franklin H. Boggs, Justice.

Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the Thirteenth day of April, A. D. 1917, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

Harry Haynes,

Appellee

vs.

No. 78

October Term, 1916.

Saline County Coal Co.,

Appellant

206 I.A. 264

ERROR TO
APPEAL FROM

Circuit

COURT

Saline

COUNTY

TRIAL JUDGE

HON,

A. W. LEWIS

Term No. 78. In the Appellate Court Volume No. 77
of Illinois, Fourth District.
October Term, 1916.

Harry Payne,	Appellee	}	Appeal from Circuit Court of Macon County, Illinois.
vs.			
Macon County Coal Com-			
pany, Corporation,			
Appellant			

Opinion by Boggs, J.

An action on the case was brought by appellee against appellant in the Circuit Court of Macon County for the recovery of damages for injury sustained by appellee while working in appellant's mine. The declaration consists of one common law count, and charges in substance that appellant furnished appellee a dangerous place in which to work and failed to warn appellee of the dangerous condition which existed in said working place. Said declaration also contained allegations to the effect that appellant had agreed not to pay compensation under the Workmen's Compensation Act. A plea of the general issue was filed by appellant, a trial was had, resulting in a verdict and judgment in favor of appellee for \$2250. To reverse said judgment appellant prosecutes this appeal. The record discloses that early in the morning of November 3, 1914, the day on which appellee received his injury, appellant's mine was under contract No. 10, off the 1914 yearly entry of the main west entry in

appellant's mine No. 3, tested the roof, examined the air and reported its condition safe. Later in the day appellee, as an extra helper to a machine man, entered said room to under-cut coal. They made an examination of the roof, found no dangerous condition and went to work. After having under-cut some eight runs in said room, several tons of coal from the face fell out and onto appellee, and caused the injury for which he seeks a recovery.

The evidence discloses that there existed what is known as a "slip" in the vein of coal situated several feet back of the face of the working in said room on the morning in question. This slip extended through several adjacent rooms along said entry in the mine and while its existence seemed to have been known to the miners generally there is no evidence in the record that its existence was known to appellee, or that his attention was ever called to the same. The slip is described as being a seam about one fourth inch wide, usually filled with soft coal and it could be seen on the walls of the rooms adjacent to the one in which appellee was injured.

On the trial of said cause appellee offered a certified copy of the notice filed by appellant with the Industrial Board of its election not to pay any compensation under the act of June 28, 1913. This evidence was objected to by appellant on the ground that it stated that the act was to go into effect on July 1, 1915, a date subsequent to the trial of said cause, but the objection was overruled and said evidence was admitted. This ruling of the court is assigned as error.

In our judgment, the notice filed with the Industrial Board sufficiently identified the act by its title, and said notice was sufficient, even though it may have contained an erroneous recital as to the date the act took effect. *Oris v. People*, 196 Ill.540; *Fallon v. People*, 196 Ill.512.

It is further contended by appellant that there was not sufficient proof of the posting of this notice to comply with the provisions of the statute. There was evidence in the record tending to show that said notice was properly posted. However, we think under the holding of this court in the case of *Bateman v. Cartersville & Big Sandy Coal Co.*, 18 Ill.App.367, that where the allegation in the declaration that the employer has elected not to pay compensation under the Workman's Compensation Act is not denied by a special plea, proof as to the execution, filing and posting of the same is thereby waived. We hold, therefore, that the record in this case establishes that appellant has elected not to pay compensation under the workman's compensation act.

It is next insisted by appellant that no recovery can be had by appellee for the reason that under the Mines and Miners Act as amended in 1911, it was not the duty of the mine examiner to examine for unsafe conditions, other than such as are particularly set forth in paragraph 4 of Sec. 92 of Chap. 93 of the Revised Statutes of 1911. Said paragraph 4 in reference to the duties of the mine examiner reads as follows: "to inspect all places where men are required in the performance of their duties to enter or to work, and to observe whether there are any recent falls or other known falls or accumulations of gas or dangerous obstructions in the room

or roadway; and to examine specially the safer and accessible parts of recent falls and old roofs and air-ways."

In the case of *Byrd v. Southern Coal Mining Co.*, 181 Ill.App.180, this court held that inasmuch as the words "or other unsafe conditions" contained in the mining statute prior to its amendment in 1911, having been omitted, that the force and effects of decisions based on the words "or other unsafe conditions" are not applicable under the amendment of 1911. Great reliance is placed by appellant on the holding in said case. Appellee, however, does not base his right to a recovery on the violation by appellant of any statutory provision for the safety of employees in mines, but upon the common law duty of appellant to furnish him a safe place in which to work. The record discloses from the condition of the rooms along this entry including the rooms adjoining said room No. 10, it clearly appears that this slip extended through most of these rooms and that it extended into room No. 10. The evidence further discloses that in several of these rooms when the vein of coal was being undercut, falls had occurred when the slip was reached; that the coal was likely to fall when the slip was reached, although it did not always do so. We think, therefore, that the record sufficiently brought to the notice of appellant and its officers the presence of this slip in said vein of coal in the entry in question, and that it extended through room No. 10, and that it constituted an unsafe condition when the coal was being undercut. It therefore warranted the jury in finding that appellant was negligent in not bringing to the attention of appellee this unsafe condition.

It is argued by appellant that if the slip was not visible in room No. 10, at the time it was examined by the mine examiner, and that the presence and fall depended upon soundings being made by him, that therefore the immediate cause of the coal falling on appellee was the under-cutting of the coal. We think, however, if the evidence in the record was sufficient to warrant the jury in finding that appellant and its officers knew or should have known of this slip, and that it extended into room No. 10, and that it was likely to fall upon being under-cut, that it was the duty of appellant to give notice to appellee thereof.

It might be observed with reference to the case of *Wyatt v. Southern Coal & Mining Co.* supra, that the court in deciding said cause found that the plaintiff knew or should have known of the condition in the mine which caused his injury and made their finding of fact that the plaintiff was not in the exercise of due care for his own safety. In this case, however, appellant having elected not to pay compensation under the Workmen's Compensation Act, it is deprived of the defense of contributory negligence and follows next, and the only question to be determined by the jury is whether or not appellant was guilty of negligence which in whole or in part resulted in the injury to appellee.

It is insisted by appellant on its argument that appellee knew of this slip in appellant's mine and that there was no occasion for appellant bringing such facts to the notice. We have searched the record and are unable to find any evidence to the effect that appellee knew of this slip or of the condition in the rooms adjoining room No. 10.

The evidence affirmatively shows that appellee never was in room no. 10 until the day he was injured. It was a question, therefore, for the jury as to whether or not appellant was guilty of negligence which resulted in the injury to appellee, and we are not able to say that the finding of the jury on that controverted question is against the manifest weight of the evidence. Unless the verdict on controverted questions of fact is against the manifest weight of the evidence, this court would not be warranted in setting aside the judgment on that ground alone. *Ovensen v. Bayly*, 125 App. 67.

It is next insisted by appellant that the court erred in giving appellee's seventh instruction to the jury. It being insisted by appellant that the instruction in effect told the jury that the slip in the coal was the proximate cause of the injury, and that it was necessary in character and directed the jury to find that the cause of the accident was the slip in the coal. We have examined this instruction and fail to find that it warrants the criticism made. The instruction directed the jury that if they believe from the preponderance of the evidence that at the time of and prior to the injury of appellee as alleged in his declaration, there existed in the coal near the track in room no. 10, a fault or slip of such a character as was likely to cause coal in the face of said room to protrude or to fall and if said fact was known to the appellee at the time, or that its existence and character could have been known by the exercise of reasonable care and diligence, and is not known to appellee, that then it is the duty of appellant

to have warned appellee of the existence of said fault or slip. We see no serious objection to this instruction, and the court did not err in giving the same.

It is next insisted by appellant that the court erred in refusing the seventh of its refused instructions. We have examined this instruction and find that the court did not err in its refusal for the reason that it called the attention of the jury to particular features in the evidence and instructed them that they should give consideration to the same in making up their verdict. This character of instruction has been frequently condemned.

Finding no reversible error in the record the judgment of the trial court will be affirmed.

Judgment affirmed.

Not to be reported in full.

1. The first section of the report is a general statement of the purpose and scope of the study. It is followed by a brief review of the literature on the subject.

2. The second section of the report is a description of the methods used in the study. This includes a description of the subjects, the experimental design, and the data collection procedures.

3. The third section of the report is a presentation of the results of the study. This includes a description of the data and a discussion of the findings.

4. The fourth section of the report is a discussion of the implications of the study. This includes a discussion of the theoretical and practical implications of the findings.

5. The fifth section of the report is a conclusion. This includes a summary of the findings and a statement of the author's conclusions.

6. The sixth section of the report is a list of references. This includes a list of all the sources cited in the report.

7. The seventh section of the report is an appendix. This includes any additional material that is relevant to the study.

8. The eighth section of the report is a glossary. This includes a list of all the terms used in the report and their definitions.

9. The ninth section of the report is a list of figures. This includes a list of all the figures included in the report.

10. The tenth section of the report is a list of tables. This includes a list of all the tables included in the report.

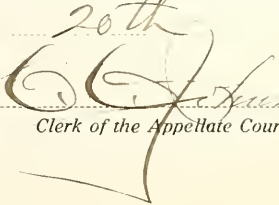
11. The eleventh section of the report is a list of footnotes. This includes a list of all the footnotes included in the report.

12. The twelfth section of the report is a list of appendices. This includes a list of all the appendices included in the report.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court

at Mt. Vernon, this 20th day of April,
A. D. 1917.


Clerk of the Appellate Court.

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Opinion of the Appellate Court

AT AN APPELLATE COURT, begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March, in the year of our Lord, one thousand nine hundred and seventeen, the same being the 27th day of March, in the year of our Lord, one thousand nine hundred and seventeen.

Present:

Hon. James C. McBride, Presiding Justice.

Hon. Franklin H. Boggs, Justice.

Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the Thirteenth day of April, A. D. 1917, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

Urie J. Hamilton,

Appellee

vs.

No. 81

October Term, 1916.

C.C.C. & ST.L.Ry.Co.,

Appellant

206 I.A. 270

ERROR TO
APPEAL FROM

Circuit

COURT

Saline

COUNTY

TRIAL JUDGE

HON. —

A. W. LEWIS

Term No. 81

In the Appellate Court
of Illinois, Fourth District.

April 22, 41

October Term, A. D. 1916.

Urie J. Hamilton, Appellee

v.

The Cleveland, Cincinnati,

Chicago & St. Louis Railway Co.,

Appellants

}
} Appeal from Circuit Court
} Saline County, Illinois.

Opinion by Logan, J.

Appellee instituted suit against appellant before a Justice of the Peace of Saline County to recover damages on certain goods alleged to have been shipped to appellee over appellant, railroad. The demand entered upon the summons issued by the Justice of the Peace was \$150.00. The Justice of the Peace on the hearing before him found for appellee and gave judgment for \$111.75. An appeal was taken to the Circuit Court of said County resulting in a verdict and judgment against appellant for \$193.42, from which appellant this appeal is prosecuted.

Appellee entered a remittitur in this court for \$28.93 reducing said judgment to \$164.49. Appellee bases his cause of action on alleged damages to twenty-five separate freight shipments. The aggregate damages, according to appellee's testimony is \$164.50.

It is first contended by appellant that as a number of said shipments were interstate shipments, in which appellant was not the initial carrier, appellee as to those is not

entitled to recover.

The leading case in this state on this proposition is *Looney v. Oregon Short line R.R.* 114.130. In that case recovery was sought for damages alleged to have resulted from the negligent transportation of certain shipments of sheep from Weiser, Idaho, to Chicago, and it was there held that recovery could only be had as against the initial carrier. The court in discussing the liability of said Railroad Company under the Hepburn Bill and Carmack amendment thereto, at page 541, says: "It has frequently been explained by the courts that the purpose of the Carmack amendment was to do away with the difficulties shippers had encountered in seeking to recover against carriers for damages to property carried over more than one line of railroad. The obstacles met by a shipper in attempting to locate responsibility for damages to property shipped over different lines of railroad were almost insuperable, and frequently the shipment, as in this case, was not only over several lines, but for long distances and in several different states. To afford a remedy for such condition Congress gave the shipper the right to institute an action, against the carrier receiving his property for an inter-state shipment, to recover damages occurring anywhere in the course of the transportation, leaving it to the carrier receiving the property to recover from the carrier on whose line or lines the damage or injury occurred." The construction of this act with said amendment was before the United States Supreme Court in *Atlantic Coast Line R.R. Co. v. Riverside Mills*, 219 U.S.133; *Mississippi R.R. v. Croninger*, 236 U.S.491, and the same construction was given as to the liability for damages to shipments being confined

to the initial carrier as is laid down in *Leamy v. Oregon Short Line R.R.* supra.

We hold, therefore, that as to all interstate shipments wherein appellant was not the initial carrier, appellee is not entitled to recover. Counsel for appellee concede that appellant was not the initial carrier as to several of said shipments, and that if recovery be limited to shipments where appellant was the initial carrier, its damages would be \$104.55. On the other hand appellant insists that it was the initial carrier in only a small number of said shipments. It will not be necessary, however, for us to determine this controverted question of fact as there will have to be another trial of this cause for losses hereafter mentioned.

It is next contended by appellant that appellee failed to make claim for loss within the time specified in the contracts of shipment, and that as to all interstate shipments where such notice was not given there can be no recovery. We think, under the great weight of authority, that appellant is right in this contention.

It is lost, if not all of the shipments in question, appellee was required to file claim for damages within four months. This requirement, we think, was reasonable and that the great weight of authority is to that effect. *U.S. Ry. Co. v. Loss*, 115 Ill.App.54; *U.S. Ry. Co. v. Collins*, 74 App.638; *U.S. Ry. Co. v. Warth*, 31 App.1; *U.S. Ry. Co. v. Herriman Bros.* 227 U.S.59; *Kansas City S.R.R. v. Carl*, 227 U.S.783.

It is conceded by appellee that as to a large number

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of said shipments it did not comply with the conditions of the contract of shipment with reference to the giving of notice of claim for damages, but he insists that the giving of said notice was waived by appellant. We do not think that the record shows a waiver. The burden was on appellee to make the necessary proof with reference to notice of claim.

It is also insisted by appellant that the court erred in giving the four instructions given on behalf of appellee. We have examined these instructions and as to instruction No. 1, we see no substantial objection, and there was no error in giving the same. Instruction No. 2 is erroneous for the reason that it does not limit the right of recovery on the interstate shipments to such of said shipments as were received by appellant as the initial carrier, and under the authorities above cited this was necessary. Instruction No. 3 is abstract in form and indefinite in character and would in our judgment tend to mislead the jury and should not have been given. Instruction No. 4 is erroneous for the reason that it authorizes recovery against appellant for any goods that were damaged while in its possession without reference to whether said goods were interstate shipments or not. If an interstate shipment, appellant, to be liable must have been the initial carrier.

For the reasons above stated the judgment will be reversed and the cause will be remanded.

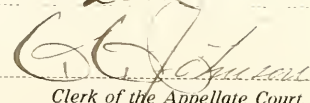
Reversed and remanded.

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court

at Mt. Vernon, this 20th day of April,
A. D. 1917.


Clerk of the Appellate Court.

OPINION

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Opinion of the Appellate Court

AT AN APPELLATE COURT, begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March, in the year of our Lord, one thousand nine hundred and seventeen, the same being the 27th day of March, in the year of our Lord, one thousand nine hundred and seventeen.

Present:

Hon. James C. McBride, Presiding Justice.

Hon. Franklin H. Boggs, Justice.

Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the Thirteenth day of April, A. D. 1917, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

John Meier,

Appellee

vs.

No. 88

October Term, 1916.

C.C.C. & St. I. Ry. Co.,

Appellant

206 I.A. 285

ERROR TO
APPEAL FROM

Circuit

COURT

Madison

COUNTY

TRIAL JUDGE

HON.

J. F. GILLHAM



Term No. 88

In the Appellate Court

Second Term

of Illinois, Fourth District.

October Term, 1916.

John Meier, Appellee

vs.

Cleveland, Cincinnati,
Chicago and St. Louis
Railway Company,

Appellant

}
} Appeal from Circuit Court
} Madison County, Illinois.
}

Opinion by Rogge, J.

This appeal is prosecuted by appellant to reverse a judgment of the Circuit Court of Madison County for \$200.00 awarded appellee for personal injuries sustained by him in being hit by a passenger train of appellant. Appellant operates a double track railroad, running east and west through Madison County, from Lenox to Hillsboro. A few miles west of the village of Worden, a public road crosses said tracks. East of this crossing was the usual whistling post for east bound trains. Some 800 feet west of the road on the south side of the tracks was a signal tower called Cape Tower. Appellee lived in a house north of the tracks and just west of the public road crossing. The record discloses that appellant, Company, was in the process of re-ballasting or raising its north track and had let the contract to White & Company, Contractors. The north track was commonly used for west bound traffic and the south track for east bound traffic, but the evidence discloses that there were connections between the tracks at various intervals and occasionally trains

were switched across and "run against the traffic." About ten days prior to the accident in question, appellee was hired by appellant's supervisor to act as a flagman of trains running over the track under repair. It was the duty of appellee to go down to Cape Tower, get orders from the operator in the tower and then go east along the tracks, set torpedoes and flag west bound traffic, to maintain a slow order over the track being re-ballasted. On the morning of the injury it was misting and windy. Appellee left his house just west of the public road and started to go to the tower to get his flagging orders, and in doing so, he testified that he went straight across the tracks toward the south side where there was a path along the south track commonly used by workmen in going to the tower. Appellee also testified that as he crossed the track he looked east and saw the train in question some two miles distant coming down the tracks. The evidence further is that appellee turned his back on the train and started to walk west toward the tower, walking on the south edge of the ties of the south track. He did not look back to see which track the train was on, but continued to walk toward the tower. When appellee had walked for some 300 feet he was struck by the pilot of the engine and severely injured. At the time of the injury in question the train was running west at about forty or forty-five miles per hour on the south or east bound track "against the traffic" having been switched over onto said track at a station east of the place of the injury. Appellee testified that he did not hear the engine whistle or the bell ring. The road supervisor and a son of appellee who were in the tower at the time of the injury both testified that the

not hear the engine whistle until it was nearly opposite the tower. On the other hand, the engineer testified that he gave the usual whistles when he was about 500 feet east of the highway and some ten short warning blasts of the whistle between that point and the place where appellee was struck, and that the bell was ringing all the time operated by an automatic ringer. He further testified that he shut off steam and applied the brakes as soon as he saw appellee was in danger of being struck. In this he was corroborated by the fireman and brakeman who testified positively as to the blowing of the whistle and ringing of the bell.

The declaration consists of two counts, the first count being the usual common law negligence count. The second count alleges that appellant was engaged in interstate commerce and that appellee was employed by appellant in such commerce. Both counts of the declaration declare on common law negligence in appellant running its train on said south track at a high rate of speed without giving timely warning by sounding the whistle. Neither count declares on the violation of any statute enacted for the safety of employees. To the first count, the appellant pleaded the general issue and also a plea denying that appellee was employed by appellant at the time of the injury; to the second count appellant pleaded merely the general issue.

At the close of appellee's evidence and then again at the close of all the evidence, instructions were submitted by appellant directing a verdict of not guilty. These instructions were by the court marked refused, and their refusal is assigned as error. It is strenuously insisted by

counsel for appellant that appellee, having knowledge of the oncoming train, which afterwards struck him, was guilty of contributory negligence in walking down the track on the end of the ties without looking around to ascertain the whereabouts of the oncoming train.

In our view of the case it is immaterial as to whether or not appellee was guilty of contributory negligence, for if entitled to recover at all, his recovery must be under the second count of his declaration. If we are correct in this conclusion, then even though appellee were guilty of contributory negligence it would only be material as affecting the amount of damages he would be entitled to recover, if entitled to recover at all. Under the decisions of our Supreme Court and the decisions of the Supreme Court of the United States, it is conclusively held that where Congress has entered the field and taken possession of a subject over which it is given control by the Federal Constitution, its possession and control is exclusive. *Staley v. I.C.R.R.Co.* 268 Ill. 356; *Devine v. C.R.I. & P.Ry.Co.* 223 U.S.1; *St.Louis, San Francisco & Texas R.R.Co. v. Leale*, 229 U.S.156.

In *Staley v. I.C.R.R.Co.*, supra, at page 377 the Court says: "The Federal Employers' Liability Act has taken possession of--has occupied--that field for the purpose of calling into play therein this exclusive power of the Federal government. Necessarily, all common or statute law of this State on that subject has been superseded. The field of liability as to employes injured while engaged in interstate commerce on railroads is occupied exclusively by the

Federal Employers' Liability Act,--and that, too, regardless of the negligence or lack of negligence of either party to the litigation. Beyond question the Federal Employers' Liability Act superseded, as to injuries of employees engaged on railroads in inter-State commerce, all statute or common law in force in the State of Illinois previous to the passage of the Workmen's compensation act.....The decedent having been engaged, at the time of his death, in inter-State commerce, the recovery must be had, if at all, under and subject to the provisions of the Federal Employers' Liability Act."

Section 3 of the Federal Employers' Liability Act provides as follows: "That in all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this act to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee; Provided, that no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation of such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

In order, therefore, to recover in an action for damages for personal injuries under said act by an employee, it is only necessary to prove that the injury was the result in whole or in part of negligence on the part of the employer. Federal Employers' Liability Act, Sec.1; Stanley v.I.C.R.R.Co.

supra. Said Sec. 1 provides among other things: "That every common carrier by railroad while engaged in commerce between any of the States.....shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee, and if none, then of such employee's parents, and if none, then of the next of kin dependent upon such employee, for such injury or death resulting, in whole or in part, from the negligence of any of the officers, agents or employees of such carrier."

On the trial of this case appellee submitted prima facie evidence that appellant was engaged in inter-State commerce, and that he, appellee, was injured while employed by the appellant in such inter-State commerce. No evidence, whatever was offered by appellant to contradict the evidence offered by appellee, and in its brief and argument appellant does not raise any question as to its being engaged in inter-State commerce, or as to appellee being employed therein. Assuming that appellant was engaged in inter-State commerce, and that appellee at the time of the injury in question was engaged in such commerce, the rights and liabilities of the parties are to be governed exclusively by the Federal Act, and the recovery, if sustained, must therefore be sustained under the second count of the declaration.

It is next urged by appellant that the manifest weight of the evidence shows conclusively that appellant was not guilty of negligence which in whole or in part caused the injury in question to appellee. The only negligence charged

against appellant in the second count of appellee's declaration on which appellee can recover is the failure of the engineer to give timely warning of the approach of the train. As heretofore stated appellee and his two witnesses testified that they did not hear the whistle blown or the bell rung prior to the injury to appellee, while on the other hand, the engineer, fireman and brakeman of appellant testified affirmatively that the whistle was sounded some 300 feet east of the high-way and at a point, at least 800 feet east of appellee, and that repeated warning blasts were sounded. Said witnesses on behalf of appellant also testified that the engine had an automatic ringer and that the bell was ringing and did not stop ringing until the train had stopped and it had been shut off by the engineer. The credibility of the witnesses and the weight to be given to their testimony was for the jury and unless we can say that the verdict of the jury is against the manifest weight of the evidence we are not warranted in reversing the judgment on that ground.

Two juries have tried this case and both of them have found the issues in favor of appellee, and that appellant was guilty of negligence as charged. In view of this fact and in view of the fact that the evidence is conflicting with reference to whether or not warning was given by the engineer by blowing the whistle and ringing the bell, we do not feel that we would be justified in reversing and remanding this cause on that ground alone.

Here two juries have found the issues in the same way on conflicting evidence, the trial or appellate courts should be slow to set aside the verdict of the jury. *Winters v. C.C.C. & St.L. Ry.Co.* 158 Ill.537.

In order to sustain the action under the Federal Employers' Liability Act, it was necessary for appellee to prove he was employed by appellant. The evidence in the record, we think, sufficiently established the employment of appellee by appellant, Company. Appellee, himself, testified that Charles Iwald, supervisor or over-seer of appellant hired him and that he got his orders or directions from Iwald. Iwald, who at the time of the trial was still in the employ of appellant, testified that he employed appellee on behalf of appellant, the Big Four railroad. This evidence was not contradicted in any way by appellant. Complaint, however, was made by appellant with reference to the rulings of the trial court in not permitting it to cross examine appellee and the witness, Iwald, on said point. An examination of the record, however, discloses that the complaint is not well taken for while the court at first limited the cross examination of appellant in reference thereto, it subsequently allowed the question put by appellant to the witness, Iwald, as to the employment of appellee, to be answered, the answer being as above stated.

Lastly, it is urged by appellant that the court erred in giving the second instruction given on behalf of appellee. This instruction is based on Sec. 1, of the Federal Employers' Liability Act, and is abstract in form, and while the whole section is not set out, still we are unable to see how the giving of this instruction could have been in any wise prejudiced the case of appellant, and we do not think the giving of the same constituted reversible error.

Finding no reversible error in the record, the judgment of the trial court will be affirmed.

Judgment affirmed.

Not to be reported in full.

Examination of the ...

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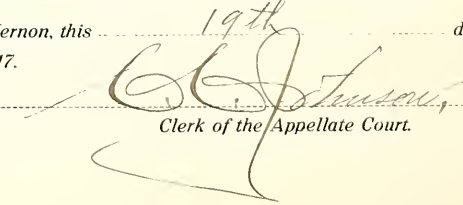
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I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court

at Mt. Vernon, this 19th day of April,
A. D. 1917.


Clerk of the Appellate Court.

3127

Opinion of the Appellate Court

AT AN APPELLATE COURT, begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March, in the year of our Lord, one thousand nine hundred and seventeen, the same being the 27th day of March, in the year of our Lord, one thousand nine hundred and seventeen.

Present:

- Hon. James C. McBride, Presiding Justice.
- Hon. Franklin H. Boggs, Justice.
- Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the Thirteenth day of April, A. D. 1917, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

William Kasten, Jr.,
Appellant

vs.

No. 17
October Term, 1916.

John Brinkman,
Appellee

206 I.A. 307

ERROR TO
APPEAL FROM

Circuit COURT

Washington COUNTY

TRIAL JUDGE

HON. J. F. GILLHAM

October Term, 1916.

William Hagten, Jr.,	}	
Appellant		
v.		Appeal from Washington.
John Brinkman,		
Appellee.	}	

Opinion by Higbee, J.

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Appellant, William Hagten, Jr., is the owner of eighty acres of land in Washington county, Illinois, lying the long way east and west. North of appellant's west forty acres is a forty acre tract of land owned by appellee and east of the latter is another forty acre tract, owned by William Hagten, Sr., the father of appellant. All of the forty acres of land owned by appellee is bottom land, except about one acre located in the south east corner, which is high and is part of a hilly slope. The land belonging to appellant is high land located on the hills or the slope thereof, except some six acres on the north side of his west forty acres, which is bottom land and lies next to appellee's tract which joins it on the north. One eight or ten acres of appellant's west forty acres including the six acres in the bottom, has a slope to the north and the rain that falls thereon flows naturally onto the forty acres owned by appellee. About twenty acres of appellant's east

forty acres, four or five acres of the forty acres be-
longing to his father and the one acre belonging to appellee
in the south east corner of his tract, along the line the
north west. The plot introduced in evidence shows a ditch
or drain starting near the southeast corner of appellant's
east forty and running in a northwesterly direction to the
southeast corner of appellee's forty, to where a road is
said to be located, thence north along the road some 75
yards, and then across the road onto appellee's land. This
ditch where it entered appellee's land is shown by the
proofs to have been about four feet deep and six feet wide,
and some of the water from it flowed out further on over
appellee's land. Some four or five years ago, appellee,
in order to more rapidly cultivate his land, dug a ditch on
his own premises between his forty acres and the west forty
acres of appellant. This ditch commenced near the high
ground in the southeast corner of appellee's land and ran
parallel with appellee's south line, and the earth taken
from it was thrown to the north of the ditch forming an
embankment on that side. The ditch and embankment so
constructed, obstructed and changed the course of the nat-
ural flow of the water from appellant's west forty, so that
instead of going across appellee's land, it was carried
west in the ditch to a point near the south east corner,
where it emptied into another ditch, which appellee had made
on his land, to carry the water from that point to the north.
In the spring of 1910, appellee made another ditch, extend-
ing from the east end of the ditch already existing on the
south line of his forty, eastwardly to the foot of the hill

in the south east corner of the tract and thence in a north westerly direction around the foot of the hill to the east side of the fort. In 1891, the Appellee threw the dirt on the north and north west side of the ditch, making an embankment on that side. This embankment extended over the higher and natural ground which divides the water from Appellant's east forty on to Appellee's land, making a dam about four feet in height. By reason of this ditch, embankment and dam, the water flowing from the east forty across, belonging to Appellant, his father's forty and the south east corner of Appellee's land, were caused to flow in a southeasterly direction, to and through the ditch on the south side of Appellee's land and immediately north of the six acres of bottom land of Appellant's east forty.

It is the claim of Appellant, and he introduced proof in support thereof, that the ditch which was excavated along the south line of his land, was filled with sediment, until the bottom is in places higher than the dead furrows leading from Appellant's bottom land; and since the last ditch and embankment were constructed that the six acres on the south side of Appellee's land may have been frequently overflowed, and crops growing there the land damaged. It is however, the contention of Appellee that there are three drains coming down to the south side of Appellee's fort, from Appellant's land and that before the dam was seen filled with grass and other vegetation by Appellant to prevent the water from passing, which was caused to cause the water to spread out over Appellant's bottom land. There is a creek about three quarters of a mile north of Appellee's land in which the water coming off the land of Appellant

and onto the land of appellee, flows, and appellee claims that overflows from this creek at times of heavy rain fall, causes the water to back over all the water land, both of appellant and appellee, in question.

It was a matter of contention on the trial whether the ditch and embankment last constructed by appellee as aforesaid, caused water to flow back on the land of appellant and injure his crops and land or detract, as claimed by appellee, it was large enough to take care of all the water that came off of appellant's land, so that water was not caused to remain or stand upon the same any longer than it did before the ditch was dug. Appellee insists that the ditch was a benefit to appellant's land rather than an injury for the reason, as claimed by him that the water was permitted to flow off more quickly than formerly. The trial resulted in a verdict of the jury in favor of appellee and a judgment against appellant for the costs of suit. Appellant has brought the record here for review, charging among other things that the trial court erred in refusing to give his instruction No. 5 and in giving instructions 14, 5 and 6 on the part of appellee.

Appellant's refused instruction No. 5 stated that the owner of higher land is entitled in cases of extreme floods to have the overflow of the surface water, follow the natural water course without artificial obstruction, and seems to state a correct principle of law, but there was no error in refusing it as it laid down an abstract proposition of law, without applying it to the case. The criticism of appellee's third given instruction, is that it

required of appellant as a prerequisite to his right to a recovery, that he prove by a preponderance of the evidence, he had been damaged and that the damage had been occasioned by the unlawful act of appellee. If the natural flow of water from appellant's land was obstructed by the erection of an embankment by appellee, even, if it was on the latter's own land, appellant was entitled to recover at least nominal damages, although as yet, he may have suffered no actual damage therefrom. He did not have to prove actual damages to entitle him to a recovery. In *Dunleigh v. Dawson* 1 Oil. 344, which was an action for diversion of a water course, Mr. Justice McCreary, who delivered the opinion of the court, says, "There are some few cases in which the doctrine seems to be sanctioned that there must be proof of actual damages to entitle the plaintiff in this and like cases to a recovery... but I think the doctrine well settled that where a party is deprived of such a right, the law will imply some damage; for otherwise before the party might be able to prove actual damage, the wrong doer might acquire a right by prescription or upon the prescription of a grant. Thus an injury is likely to ensue from such an invasion of his right, and which is sufficient damage to sustain this action for the recovery of nominal damages at least, and to establish his right... It is the opinion of the court, that an action will lie for the violation of the right, without proof of actual damages."

In *Weller v. Illinois* 7 Ill. 2d 303, the rule is announced that, "where water is wrongfully diverted from a mill-race, or where it is wrongfully caused to overflow lands,

the injured party should recover without proof of damages; and even where the injury is so small that it cannot be estimated, still the injured party is entitled to at least nominal damages. *Field on Damages*, 680; *Cory v. Wilcox*, 9 Ind.39; *Monroe v. Stickney*, 48 Me. 462; *Tilwell v. Lincoln*, 11 Gray 434. If the appellee continues the flowing of the appellant's lands, as clearly shown by the evidence he has done, and be unmolested in so doing, the continuance thereof will soon ripen into a right to do so, and would be evidence from time to time, more and more cogent, that he is but in the enjoyment of such a right, and it is for these reasons, among others, that the law in cases of this character is so strenuous for nominal damages, even where no special damages have been shown by the proof." (See also *Blackman v. Boehl* 30 Ill.App.455) Instruction No. 3 therefore did not state the law correctly and the trial court erred in giving it.

Instructions 4, 5 and 6 given for appellee were as follows: "4. The court instructs the jury that a land owner has a right to change the course of a natural stream within the limits of his own land, provided that in so doing he does not cast on the land of an adjoining proprietor water which would not in the course of nature flow thereon, and restores the stream to its original channel before such adjoining proprietor's land is reached."

"5. The court instructs the jury that if you believe from the evidence that the defendant, John Linker, constructed a levee and dug a ditch, which was wholly upon his own land and thereby changed the natural flow of water, and

that he restored it to its natural outlet on his own land, and that he did not cast upon the land of the plaintiff, William Kasten, Jr., water which would not in the course of nature flow thereon, then you should find the issues in favor of the defendant."

"6. The court instructs the jury that the defendant has a right to dig ditches and convey water in any course he desires, so long as the ditch is wholly upon his own land, provided that by doing so he does not cast upon the land of an adjoining property owner water that would not in the course of nature flow thereon".

These instructions stated in a measure correctly, the law applicable to the owner of the dominant estate, but were misleading and not applicable to the issues in this case, for the reason that the proof showed that appellee Forster the instructions were given, was the owner of the servient estate. The rights of the servient owner are wholly different from those of the owner of the dominant estate and different rules must be invoked concerning them. In *William v. Madison Co.R.R.Co.* 49 Ill.484, the following language is used, "In *Hauffman v. Griesemer* 26 Pa. the doctrine was recognized that the superior owner might improve his lands by throwing increased waters upon his inferior, through the natural and customary channels, and in *Martin v. Middle* 18. 415, it was held, where two fields adjoin and one is lower than the other, the lower must necessarily be subject to all the natural flow of water from the upper one and the owner of the lower ground, has no right to erect embankments,

whereby the natural flow of the water from the upper ground shall be stopped."

And later in the same opinion, our court quotes approvingly from *Martin v. Middle*, supra, the following: "The owner of the upper field has a natural easement as it is called, to have the water that falls upon his own land flow off the same upon the field below, which is charged with a corresponding servitude in the nature of dominant and servient tenements". To the same effect is *Town of Bois Blanc v. Convery* 255 111.511.

The three instructions above referred to contained material error as applied to the pleadings and proof in this case and for this reason, together with the error contained in instruction No. 3 given for appellee, the judgment of the trial court will be reversed and the cause remanded.

Reversed and remanded.

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court

at Mt. Vernon, this
A. D. 1917.

25th

day of April,



Clerk of the Appellate Court.

Reg 3125

Opinion of the Appellate Court

AT AN APPELLATE COURT, begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March, in the year of our Lord, one thousand nine hundred and seventeen, the same being the 27th day of March, in the year of our Lord, one thousand nine hundred and seventeen.

Present:

Hon. James C. McBride, Presiding Justice.

Hon. Franklin H. Boggs, Justice.

Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the Thirteenth day of April, A. D. 1917, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

S. L. James,

Appellee

vs.

No. 20

October Term, 1916.

Illinois Central Railroad Co.,

Appellant

206 I.A. 309

ERROR TO
APPEAL FROM

Circuit

COURT

Hffingham

COUNTY

TRIAL JUDGE

HON. WM. B. WRIGHT



October Term, 1917.

James,	}	Appellee
v.		
Illinois Central Rail-	}	Appellant
road Company,		

Opinion by Hughes, C.

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This is an action to recover the value of a horse belonging to appellee, W. L. James, which was struck and killed by a freight train of appellant, Illinois Central Railroad Company, on November 17, 1914. The horse escaped from appellee's barn and came on to appellant's track at a point within the corporate limits of the village of Dieterich where appellant was under no duty to force its right of way. The accident occurred about one o'clock P. M. Appellant operates a railroad through Dieterich in an easterly and westerly direction. Commencing at a point a short distance west of the depot the track as it extends eastward curves to the north, until it reaches a point about 75 feet east of the depot and about 150 feet west of a culvert, from which point on east it is straight. The track is down grade from a point west of the depot to the culvert, and from the culvert east is up grade. The train in question was a freight train of 26 loaded cars going east and at the time

of the accident was traveling at the rate of about 30 miles per hour. The horse came upon the track from the north on the fireman's side of the engine, and, as its tracks showed, at a point about 30 feet west of the culvert, and ran in front of the engine to a point about 120 feet east of the culvert, where it was struck by the engine and killed. The case was started before a justice of the peace and on appeal was tried before a jury in the circuit court of Litchfield county, where a verdict was returned in favor of appellee for \$100. A motion for a new trial was overruled, a judgment entered on the verdict and an appeal taken to this court by the railroad company. Appellant assigns as error the trial court's refusal to give its peremptory instruction, the giving and refusing of other instructions, the terms of verdict submitted to the jury by the court, and the overruling of the motion for a new trial.

Upon the trial, the court gave an instruction which told the jury, "if from all the evidence and all the circumstances shown in evidence, you believe, by the preponderance thereof that by the exercise of reasonable care and caution the horse could have been seen by the employees of the defendant in charge of said train after said horse was on the track of defendant's railroad in time to have stopped said train or to have reduced its speed so as not to have killed said horse by the exercise of reasonable diligence, then it was the duty of said employees to have done so". Three other instructions given for appellee imposed upon the railroad the duty to exercise reasonable care and precaution to discover the presence of the horse on the track. These in-

structions were erroneous as the only duty a railroad company owes to an animal trespassing upon its tracks is to refrain from wantonly or wilfully injuring it, and to use reasonable care and diligence to avoid injury to it after it is discovered to be in peril. The duty to exercise care as to such an animal arises only after discovering it to be on the track. ~~xxxxxxx~~ The Company has the right to an uninterrupted use of its track and it is justified in assuming, and in acting upon the presumption, until the contrary is brought to its attention, that its right in that respect will not be interfered with. *I.R. Co. v. Godfrey*, 71 Ill. 111; *I.R. Co. v. Noble*, 142 Id. 575; *I.R. Co. v. Lister*, 100 Id. 586; *St. L. & N.W. Ry. Co. v. Starr*, 53 Ill. App. 111. However appellant is not in position to complain of this error, for the reason that the same principle of law was embodied in several instructions given in its behalf. A party cannot complain of an error in instructions where the same error is found in the instructions offered by the opposing party. *Meinturff v. Ins. Co.* 248 Ill. 92; *Salawic v. Salawic* 179 Ill. App. 118.

The court properly instructed the jury as to the form of verdict, but, it appears, attached to the instructions two forms of verdict. One was in the usual form for finding for the plaintiff, and the other was, "and, the jury, find the defendant guilty". Obviously the word "and" was inadvertently omitted from the latter. As, however, the forms were properly stated in the instructions, the jury could not have been misled and this patent mistake was not reversible error.

There was much evidence introduced as to whether the curve in the track just west of where the horse was struck was such as to prevent appellant's engineer and firemen from seeing the horse in time to have avoided the accident by the exercise of reasonable care and diligence. The engineer testified he was in his seat looking ahead while passing through Dieterich; that on account of the track curving towards the fireman's side he did not see, and could not have seen the horse even a short distance ahead of the engine; that upon hearing a warning cry from the fireman he shut off the steam and partially applied the air brake and asked the fireman what was the matter, but at that time the horse had been hit. The fireman testified that as they passed through Dieterich he was firing the engine in order to make the grade east of the culvert; that as he climbed into his seat he saw the horse run on to the track from the north side of the track immediately in front of the engine and called to the engineer and that the horse was struck, in a few seconds. The section foreman testified that to within a hundred feet of the culvert an engineer sitting on the right side of an engine coming from the west could not see a horse on the track 15 feet ahead of the engine. Witnesses for appellee testified further some distance more than 100 feet west of the culvert, the curve of the track is so slight that the view to the east is unobstructed. There is no evidence save that of the fireman that the trainmen saw the horse. If his testimony is true, there was no failure to exercise due care and diligence after discovering the horse or even in discovering it.

The preponderance of the evidence appears to sustain the claim of appellant that there was a curve in the railroad track which prevented the engineer from seeing the horse on the track. The testimony of the engineer and fireman demonstrate that they were not guilty of carelessness or negligence in striking the horse and are, in fact, to the contrary would be against the verdict against the evidence. Under this view of the facts taken in connection with the fact that the case was tried upon a false theory as to the law, we are of opinion the trial court should have granted a new trial, and for its error in not doing so the judgment will be reversed and the case remanded.

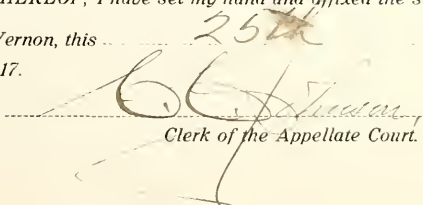
Reversed and remanded.

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court

at Mt. Vernon, this 25th day of April,
A. D. 1917.


Clerk of the Appellate Court.

Registered June 16, 1917

3126

Opinion of the Appellate Court

AT AN APPELLATE COURT, begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March, in the year of our Lord, one thousand nine hundred and seventeen, the same being the 27th day of March, in the year of our Lord, one thousand nine hundred and seventeen.

Present:

Hon. James C. McBride, Presiding Justice.

Hon. Franklin H. Boggs, Justice.

Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the Thirteenth day of April, A. D. 1917, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

		206 I.A. 311	
Corn Belt Bldg. & Loan Assn.,		ERROR TO	
Appellant		APPEAL FROM	
vs.		Circuit COURT	
No. 23			
October Term, 1916.			
Citizens' Nat'l Bank of Evansville		Edwards COUNTY	
Indiana, et al,			
Appellees			

TRIAL JUDGE

HON.

J. C. EAGLETON



October Term, 1916.

Corn Belt Building and Loan Association,)	
Appellant)	
v.	)	Appeal from Edwards.
Citizen's National Bank of Evansville, Indiana, et al,)	
Appellees)	

Opinion by Higbee, J.

---oOo---

Appellant, Corn Belt Building and Loan Association, foreclosed a mortgage on the property involved in this case, and became the purchaser thereof at the sale by the master in Chancery of Edwards county for the amount of its debt, interest and costs, and on the same day, February 18, 1914, received a certificate of purchase therefor. After the twelve months allowed by statute for the redemption of said property by the mortgagor had expired, but before the expiration of the fifteen months period allowed judgment creditors to redeem, appellee, Citizens National Bank of Evansville, Indiana, obtained a judgment against the mortgagor for \$300. On April 21, 1915, appellee caused an execution to be issued on its judgment and placed the same in the hands of the sheriff and also deposited with him the sum of \$2721.25 redemption money. The sheriff endorsed on the execution a levy on the property, issued a certificate

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of redemption to appellee and advertised the property for sale on May 14, 1915. The certificate of redemption did not contain a correct description of the land when filed for record but before it was recorded and in the presence of the sheriff, it was corrected by attorneys for appellee. The sum of \$2721.25 deposited with the sheriff by appellee was still less than the amount bid by appellant at the foreclosure sale, together with interest thereon up to the time of the deposit. This was due to a mistake by attorney for appellee in computing the interest and does not appear to have been discovered by any one until after the filing of the bill in this case on May 15, 1915. Appellant paid the taxes on the property for the year 1913 amounting to about \$57 and filed the receipt therefor with the master in chancery. Appellee paid the taxes for 1914 but the amount deposited by him with the sheriff did not include the taxes of 1913 paid by appellant. Allen W. Walker, attorney for appellee testified that on the evening of May 13, having learned that appellant had paid the taxes for 1913, he told Curt Thornton, secretary of appellant, he would on the next day pay him these taxes and any other amount legally due the Building and Loan Association. This Mr. Thornton denies but admits he left town the next day so these taxes could not be paid or tendered to him. The \$10 shortage in interest had not then been discovered. At the sale of May 14, 1915, W. J. Quindry, who appeared at the trial below as one of the attorneys for appellant, inquired of the sheriff what bid he already had on the property and was told \$2721.25. Whereupon Quindry bid \$2725 and was declared the purchaser. At his request the sheriff gave him

until six o'clock that evening, to pay the money. Before that time the sheriff, after consulting an attorney, executed and delivered to appellee a deed for the premises, which was recorded. Quindry never at any time tendered the sheriff any money, and neither does the evidence disclose whether he was bidding for himself, appellant or some third person. On May 13, Thornton and Quindry drove from Union, the place of the sale, to some deep, a distance of seven miles, and sought to induce the master in chancery, at five o'clock in the morning to execute a deed to the property to appellant. The master in chancery having learned of the sale and issuance of the deed on the 14th refused their request. When Thornton and Quindry returned to Union, about eight o'clock A.M. the same day, Allen M. Walker, attorney for the bank tendered to Thornton \$250 in cash to cover the amount paid by appellant for taxes, the mistake of \$50 in interest, and any other sum which might be due the Building and Loan Association, which was refused. On the same day appellant filed its bill against the bank, master in chancery and sheriff to set aside the bank's deed, and compel the master in chancery to execute and deliver to appellant a deed to the premises, as purchaser under the foreclosure sale. When the case was called for hearing the bank tendered in open court \$50 to cover any amount due appellant, which was also refused. On the hearing the court dismissed the bill for want of equity.

The validity of the redemption by the appellee bank and the sheriff's deed to it were upheld in this court in the recent case of *Forster v. Citizen's Nat. Bank of Knoxville*,

Ind. opinion filed November 13, 1910 where the facts are more fully set forth but appellant was not a party to that case.

By its purchase at the foreclosure sale, appellant required no title to the land, either legal or equitable. It had only the right to receive the redemption money, or in case no redemption should be made either by the owner or the equity of redemption or by a judgment creditor, to receive a master's deed at the expiration of the period of redemption. *Strauss v. Lockman*, 200 Ill.76; *Trayner v. Baldwin*, 261 Ill.67; *Sutherland v. Long* 1973 Ill.309. It is true appellee should have deposited \$10 more with the sheriff and paid the taxes for 1913, yet as soon as the mistake was discovered and the latter of the taxes learned, appellee made an honest and earnest effort to pay same to appellant. That appellant did not receive same on May 14, the last day of the period of redemption, is the fault of its secretary, who purposely avoided the possibility of the payment or tender to him and it has since steadfastly refused to accept same. It is contended by counsel that the redemption by appellee is invalid because sufficient money was not deposited with the sheriff for that purpose and the tender of \$270 to it was made on May 15 one day after the expiration of the period of redemption. As above stated this was the fault of appellant's secretary, who purposely concealed himself so that no tender could be made him on the 14th.

The supreme court of this state has repeatedly held that a liberal construction is to be given to our redemption laws, to the end that the property of the debtor may pay as

many of his debts as possible. *Trause v. Buckhorn*, supra;
Meier v. Milton, 187 Ill.174; *Whitehead v. Hall*, 148 Ill.213;
Schuck v. Gerlach, 101 Ill.136; *Trause v. Hutch*, 326 Ill.
320. Should appellant prevail in its contention, not only
will it obtain the full amount of its judgment and interest
thereon, but also an equity of redemption shown to be worth
some \$2000 in addition, and appellee will receive no part of
its judgment. On the other hand if appellee's deed is sus-
tained, appellant will receive its judgment in full and in-
terest thereon and the debtor's property will be made to
pay appellee \$2000 on its \$1500 judgment. It is plain that
to sustain appellant's position would be inequitable and a
breach of the rule of construction announced in the above
cases. It would certainly be a sacrifice of the debtor's
property in this case, to permit appellant to receive \$2000
worth of property more than the amount of its judgment and
interest on account of the insignificant irregularities shown
and deprive appellee bank of the benefit of such \$2000 on its
judgment. As stated in *Sutherland v. Long*, 273 Ill.309, "such
a result would not be tolerated in a court of conscience
unless made inevitable by settled and unalterable rules of
law". It does not appear how the redemption of the property
by appellee bank can work any injustice to appellant, which
may still secure the redemption money to which it is en-
titled. Whatever irregularities there were were technical
and did not go to the substantial merits of the case and
should not render the redemption and subsequent sale void.
Whitehead v. Hall, supra, *Wornly v. Moore*, 100 Ill.490.

Appellee had deposited with the sheriff \$11.00 and Quindry's bid of \$2.25 was not greater than this amount plus interest thereon and the costs of the redemption and the sale. Neither did Quindry make any effort or appear to comply with his bid. It was therefore the sheriff's mandatory duty to execute a deed to the appellee bank forthwith. The correction in the certificate of redemption, made by attorney for appellee in the presence and with the consent of the sheriff before it was recorded, did not render the same invalid. It was the duty of the sheriff to make this certificate and the mistake was made without fraud or negligence on the part of appellee bank, which should not be prejudiced thereby. *Corava v. Bonner* 205 Ill. 311; *Twyman v. Baldwin*, supra.

There is an absence of proof in the record of any fraud or deceit on the part of the appellee bank and the equities of the case are clearly with it. The decree of the trial court will be affirmed.

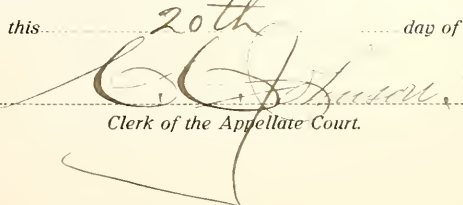
Affirmed.

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court

at Mt. Vernon, this.....20th..... day of April,
A. D. 1917.


Clerk of the Appellate Court.

NOINI

3128

Opinion of the Appellate Court

AT AN APPELLATE COURT, begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March, in the year of our Lord, one thousand nine hundred and seventeen, the same being the 27th day of March, in the year of our Lord, one thousand nine hundred and seventeen.

Present:

Hon. James C. McBride, Presiding Justice.

Hon. Franklin H. Boggs, Justice.

Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the Thirteenth day of April, A. D. 1917, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

Henry T. Witwer,

Appellant

vs.

No. 29

October Term, 1916.

John H. Curry,

Appellee

206 I.A. 318

ERROR TO
APPEAL FROM

Circuit

COURT

Effingham

COUNTY

TRIAL JUDGE

HON.

WM. B. WRIGHT



October Term, 1916.

Henry T. Witwer,)	
Appellant)	
v.	)	Appeal from Affingham.
John T. Curry,)	
Appellee)	

Opinion by Wigbee, J.

This is an action instituted before a justice of the peace by appellant, Henry T. Witwer, to recover for damages done to his automobile by the employes of appellee, John T. Curry, at whose garage he had left it for repairs. Appellant secured judgment before the justice for \$25. Appellee appealed to the circuit court of Affingham county and filed a set off for the materials furnished by him and labor performed by his employes in repairing the car. A trial was there had before a jury and a verdict was returned in favor of appellee for \$37.50. A motion for a new trial was overruled and judgment entered on the verdict from which an appeal was taken to this court. The real question in controversy in this case is one of fact, and it is the province of the jury to determine all questions of fact. It is a rule so well established that no citation of authorities is required to support it, that a verdict will not be set aside whenever there is a contrariety of evidence, if the

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facts and circumstances in proof, by a fair and reasonable intendment will authorize the verdict. The question of fact in this case was determined by the jury, there was proof to sustain their verdict and it should not be disturbed.

It is urged on the part of appellant that the second instruction given on the part of appellee was erroneous. This instruction stated that in order to recover appellant must show by a preponderance of the evidence that his property was damaged through the negligence of appellee and that he exercised reasonable precaution to prevent such damage. This instruction is inaccurate and does not appear to apply to the facts in this case. The trial court was probably moved to give it because appellant had taken his car away from the garage of appellee. The instructions are, however, to be considered as a single series, and when so considered, it is sufficient if, as a whole, they state the law correctly, even though one or more of them standing alone may be erroneous. (*Insurance v. Goodwin*, 171 Ill. 334; *Central v. Co. v. Danister*, 193 id. 48). The instructions as a whole in this case fairly and correctly advised the jury of the law applicable to the facts in proof, and fully stated appellant's theory of the law. The inaccuracy in this instruction could not have misled the jury and the giving of it should not cause a reversal of the judgment.

Finding no material error in the record the judgment of the trial court is affirmed.

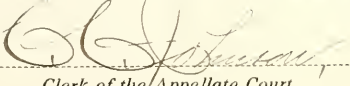
Affirmed.

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court

at Mt. Vernon, this..... 25th day of April,
A. D. 1917.


Clerk of the Appellate Court.

5127

Opinion of the Appellate Court

AT AN APPELLATE COURT, begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March, in the year of our Lord, one thousand nine hundred and seventeen, the same being the 27th day of March, in the year of our Lord, one thousand nine hundred and seventeen.

Present:
Hon. James C. McBride, Presiding Justice.
Hon. Franklin H. Boggs, Justice.
Hon. Harry Higbee, Justice.
CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the Thirteenth day of April, A. D. 1917, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

		206 I.A. 320	
Neil H. Crossett,		ERROR TO	
Appellant		APPEAL FROM	
vs.		Circuit	
No. 34		COURT	
October Term, 1916.			
Lila Wittmore,		Marion	
Appellee		COUNTY	

TRIAL JUDGE

HON. W. B. WRIGHT

October Term, 1916.

Neil E. Crockett,)	
)	
Appellant)	
)	
v.	)	Appeal from Marion.
)	
Ellie Withmore,)	
)	
Appellee)	

Opinion by Pigbee, J.

---080---

This is an appeal from the decree of the circuit court of Marion county, dismissing for want of equity, a bill filed by appellant, Neil E. Crockett, against appellee, Ellie Withmore, to modify a decree of divorce entered by that court at the September term, 1909 thereof, in the case of Neil E. Crockett, complainant v. Ellie Crockett, defendant. The defendant has since married again and is now Ellie Withmore.

In the decree in the divorce case the court found that the parties were married November 3, 1904 and that on April 6, 1907 the said defendant without any reasonable cause deserted the said complainant. The court also found that as the issue of said marriage a child, Dwight E. Crockett was born on October 14, 1907 and was then living with the mother in St. Louis, Missouri, and that the father had been contributing \$10 per month to his support. The court ordered that he should continue to contribute to the support of the child at the rate of \$12.50 per month until the further order

of the court and awarded the custody of the child to the mother. The prayer of the bill in the present case asks that the decree in the divorce case be modified relieving appellant from the payment of said \$12.50 per month and awarding the care, custody, control and education of the child to him. At the time the decree for divorce was entered appellee was and had been for two years prior thereto living with her mother in St. Louis and the child had been with her all that period, save for one visit of about three weeks with the father in Salem, Illinois. On the day of the hearing in the divorce case, it was agreed by appellant and appellee that if appellant would turn over to appellee certain letters which she had written him and which he claimed were violations of the Federal Statutes, she would not contest the case. The decree in that case so far as the custody of the child was concerned, was virtually a decree by consent. Appellant is a clerk, industrious and of good reputation, living with his sister and aged mother, in Salem, Illinois, and earns \$15 per week. Appellee lives in St. Louis, Missouri, and as shown by the evidence, is a woman of good repute in her community. The child at the time of the hearing in this case was about nine years of age, has a good head and is being well taken care of by his mother.

Counsel for appellant urges that the trial court erred in not permitting him to introduce in evidence copies of the letters turned over to appellee at the time of the divorce hearing. The evidence discloses he had prior to that hearing threatened to prosecute her for sending these letters through the mails. Upon her agreement not to contest

the divorce case appellant or his attorney detached these letters from an affidavit in the file and delivered them to her. Without her knowledge he had kept copies of them and it was these copies he sought to introduce in evidence. Counsel urges that all proofs in the divorce case were admissible in the present case. These letters, however, were not shown to have been introduced in evidence in the divorce hearing. On the contrary they were delivered to appellee before the hearing and the chancellor properly excluded the copies on this hearing.

It is also assigned as error that the findings and decree of the trial court are contrary to the law and the evidence in the case. It is true that ordinarily in case of the separation of parents the court will not permit the child to be removed beyond its territorial jurisdiction. In this case, however, the child was in St. Louis, Missouri at the time the decree in the divorce case awarded him to the mother and had been there for two years prior thereto. This fact was known to the father and no doubt to the court at that time. That the court awarded the child to the mother under those circumstances was due, beyond question to the fact that the father consented to the same in accordance with his agreement with the mother. The conditions as they then existed have not materially changed. No good reason has been shown by the proofs why the care and custody of the child should now be changed from the plan virtually agreed upon when the decree for divorce was entered.

As the mother has since married, the Chancellor

might well have modified the allowance of salary, but that was a matter largely in his discretion, and as that discretion does not appear to have been abused in this case the decree should be affirmed.

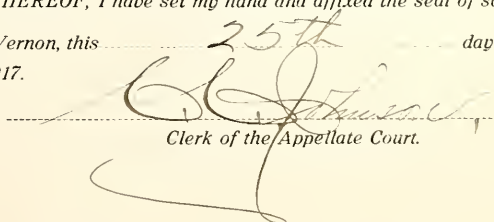
Affirmed.

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court

at Mt. Vernon, this 25th day of April,
A. D. 1917.


Clerk of the Appellate Court.

NOINI

3130

Opinion of the Appellate Court

AT AN APPELLATE COURT, begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March, in the year of our Lord, one thousand nine hundred and seventeen, the same being the 27th day of March, in the year of our Lord, one thousand nine hundred and seventeen.

Present:
Hon. James C. McBride, Presiding Justice.
Hon. Franklin H. Boggs, Justice.
Hon. Harry Higbee, Justice.
CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the Thirteenth day of April, A. D. 1917, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

206 I.A. 322	
O. R. Morgan,	
Appellee	
	ERROR TO APPEAL FROM
vs.	
No. 38	Circuit COURT
October Term, 1916.	
City of Vienna,	Johnson COUNTY
Appellant	

TRIAL JUDGE

HON. W. N. BUTLER



October Term, 1916.

G. H. Morgan,	}	
Appellee		
v.		Appeal from Johnson.
City of Vienna,		
Appellant)	

Opinion by Higgins, J.

-----o(o)-----

In February, 1903, appellee, G. H. Morgan, purchased block 39 in Chapman and Gray's Addition to the city of Vienna. In April, 1915, appellant, the city of Vienna, through its street inspector and servants, constructed a sidewalk along the north side of this block against the objections of appellee. Augusta H. Hess formerly owned the land immediately north of this block. Her husband Samuel Hess used and had the control of both her land and block 39. Sometime prior to 1870, while Mr. Hess had control of these lands he built a rail fence just north of the north line of block 39 about where the north edge of the walk now is. About 1876 or 1881 this fence was replaced with a post and plank fence, portions of which were still visible when appellee purchased the property. Appellee graded and sodded the premises and kept the grass mowed to the line of this old fence, which would be a few feet north of the north line of block 39. In 1900, Augustax H. Hess sold some of the land owned by

her just north of block 39 and the land in the deed was described as being bounded as follows: "Beginning on the east line of said tract, 50 feet north of the northwest corner of block 39, in the town of Vienna, thence west 150 feet, thence north 50 feet, thence east 150 feet to the said line, thence south to the place of beginning."

From that date the strip of ground just south of the land conveyed by her was left open and about 1900 Appellant's servants did some grading thereon. At no time, however, prior to the building of the walk in 1914 did Appellant do any work on that portion of this strip of ground south of the line of the old fence, which is the ground in controversy. Appellee brought an action of tres pass quare clausum fregit against Appellant. The latter filed its plea of the general issue and liberum tenementum and issue were joined. The case was tried before a jury and judgment was rendered against Appellant for \$40 and costs. The plea of liberum tenementum admitted that Appellee was in possession of the ground and the doing of the acts charged.

Proof of the dedication to and acceptance by the city of the strip of ground in question is not very clear. It is true that in the deed of Augusta B. Hess by which she conveyed to Charles H. Gray the land north of block 39, the description began 50 feet north of the north line of block 39. This is not proof that the grantor owned or claimed to own all of the fifty feet south of the land conveyed by the deed. If this is any proof of a dedication by her, at best it can only be proof of a dedication of just such portion of said fifty foot strip as was then possessed by her, and

and the first of these is the fact that the
 country is a very fertile one, and the
 soil is very rich, and the climate is very
 warm, and the people are very happy, and
 the country is very beautiful.

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The fifth of these is the fact that the
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 soil is very rich, and the climate is very
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 the country is very beautiful.

not of any portion thereof, which was at that time in the possession of another. The date of this deed was June 1, 1897. A fence had been built prior to 1890 on the north line of the strip of ground in controversy and portions of this fence, or the one replacing it, remained when respondent purchased block 39 in 1903. There is no evidence that appellant exercised any control over the land south of where the fence was, prior to the building of the wall garden in 1915. We are therefore inclined to the opinion that the proof is not at all clear of the dedication and acceptance of the particular strip of ground in question.

The judgment must be reversed however on account of erroneous instructions given. The fifth and sixth instructions given in behalf of appellee advised the jury that punitive or exemplary damages could be awarded in this case. Our attention has not been called to, and we have been unable to find, a decision in this state in which punitive or exemplary damages against a city have been sustained in a case of this nature. To justify such damages in any case, the act complained of must partake of a criminal or quasi criminal, or either malice, violence, oppression or wanton recklessness must be shown. Justice Breese in the case of *City of Chicago v. Martin* 49 Ill. 241 said, "It is scarcely conceivable that a case could be made against a municipal corporation justifying punitive damages." In *City of Chicago v. Kelley* 18 Ill. 473 the court said, "Punitive or exemplary damages are not to be given unless there is proof the injury is wilful which is scarcely possible in the case of this class of corporations" (a city). Practically the same lan-

guage was used by the court in the City of Decatur v. Fisher, 53 Ill.407. While it may be appellant had no authority to take possession of the ground in question from appellee and against his objections without first invoking the aid of the court, even though a dedication and acceptance had been shown, yet there were no facts in record in this case justifying the giving of the fifth and sixth instructions of appellee, under the foregoing authorities. The instructions were the more harmful because of the fact that the proof as to the actual damages sustained by appellee was not clear.

For the error in giving these instructions the judgment is reversed and the cause remanded.

Reversed and remanded.

Not to be reported in full.

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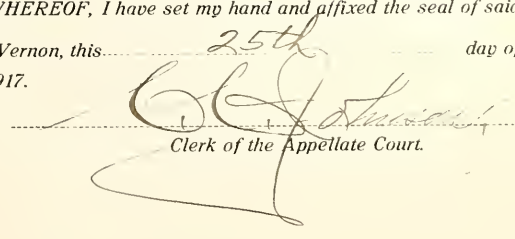
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I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court

at Mt. Vernon, this.....25th..... day of April,
A. D. 1917.


Clerk of the Appellate Court.

NOIN

Opinion of the Appellate Court

AT AN APPELLATE COURT, begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March, in the year of our Lord, one thousand nine hundred and seventeen, the same being the 27th day of March, in the year of our Lord, one thousand nine hundred and seventeen.

Present:

Hon. James C. McBride, Presiding Justice.

Hon. Franklin H. Boggs, Justice.

Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the Thirteenth day of April, A. D. 1917, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

Farmers State Bank of

Tamaroa, Ill.,

Appellant

vs.

No. 43

October Term, 1916.

Mark Blanchard,

Appellee.

206 I.A. 323

ERROR TO
APPEAL FROM

County

COURT

Perry

COUNTY

TRIAL JUDGE

HON.

LOUIS R. KELLY

October Term, 1916.

Farmers State Bank of Tamarac,	)	Appellant	}	Appeal from Verdict.
Illinois,				
v.				
Mark Blanchard,	)	Appellee	}	

Opinion by Wigton, J.

---010---

[Morton Brothers, a firm composed of John B. Morton and James Morton, were engaged in the general merchandise business in the village of Tamarac, Illinois. They became heavily involved and among their creditors were the Farmers State Bank of Tamarac, Illinois and W. L. Walker Dry Goods Company of St. Louis, Missouri. On March 2, 1916, James Morton went to St. Louis and arranged with W. L. Walker Dry Goods Company to assign to it the stock of goods and book accounts of Morton Brothers. On March 3, he returned to Tamarac with W. L. Hawkins, a representative of said Dry Goods Company and on that day an instrument in writing was executed and acknowledged by Morton Brothers, conveying to W. L. Walker Dry Goods Company, their stock of merchandise furniture and accounts in trust, to carry on the business, collect the accounts, sell the stock at public or private sale, distribute the money among the creditors and if anything remained after the payment of the debts and

expenses, return the same to the parties making the conveyance.

The instrument was delivered to Plaintiff, who took possession of the stock at once in behalf of J. A. Walker Dry Goods Company and proceeded to take an invoice thereof, which was completed in eight days, showing valuation of \$11,000. No sworn list of Norton Brothers' creditors was ever furnished by J. A. Walker Dry Goods Company, but on March 4 it sent to such of the creditors of Norton Brothers as it had knowledge of, a letter notifying each of the conveyance to it and inclosing a blank acceptance of the arrangement, to be returned to it, either with the amount of the creditor's claim. Plaintiff received one of these letters but never replied to the letter nor returned the acceptance. On March 16, J. A. Walker Dry Goods Company, notified the creditors of the amount of the invoice and indebtedness, so far as they had learned same, and that the stock of merchandise and fixtures would be sold March 26, 1910, upon sealed bids. On March 24 a notice of this sale was posted in the window of the store building and on the following day notices were published in several newspapers. Norton Brothers had been conducting the business in a building owned by J. H. Haines, a brother-in-law of ^{defendant} ~~appellee~~. About March 14, ^{defendant} ~~appellee~~ leased the building from Haines and on March 27 he went to St. Louis with Haines and left a bid of \$5,200 with J. A. Walker Dry Goods Company for the stock and fixtures. On the morning of March 28, having been informed by Haines that a higher bid than his had been submitted, ^{defendant} ~~appellee~~ went to St. Louis, with-

draw his bid of \$5,200 and filed one for \$5700. The stock was sold to him at that price and he at once went into possession of the same. No list of Norton Brothers' creditors was demanded by or furnished to ^{appellant} ~~appellee~~. In April 19, ^{Plaintiff} ~~appellee~~ reduced its claim against Norton Brothers to a judgment by nair and cognovit, in the sum of \$448.85 and execution was issued thereon the same day. The sheriff levied the execution on April 14 on a portion of the stock then in possession of ^{appellee} ~~appellee~~ to the value of \$333.15. ^{Defendant} ~~appellee~~ served notice upon the sheriff that he claimed the property as his own and a trial of the rights of property was had, in the county court of Perry county, which resulted in a judgment for ^{defendant} ~~appellee~~ from which judgment the bank has taken an appeal to this court.

In this case the sole question to be determined is, was appellee the owner of the property involved at the time it was levied on. The transfer or assignment by Norton Brothers of the stock of merchandise, fixtures and bank accounts to Ely & Walker Dry Goods Company, does not in any particular comply with the requirements of the Bulk Sales law and it is not contended by appellee that it does. The most that can be claimed for the instrument of assignment or conveyance is that it constituted Ely & Walker Dry Goods Company the agent of the Norton Brothers, to conduct the business for a time and then to sell the property. It is a well settled rule of law that the principal cannot bestow upon the agent any greater authority concerning the subject matter of the agency than the principal himself had. As Norton Brothers could not sell this stock of goods in bulk

without complying with the Bulk Sales Law neither could their agent, Jly & Walker Dry Goods Company. The sale by Jly & Walker Dry Goods Company to appellee did not in any way comply with this law and must so far as such law is applicable to this case be held void as to appellant and other creditors not consenting thereto.

Neither did the transfer or assignment to Jly & Walker Dry Goods Company comply with the terms of the statute of this state concerning assignments for the benefit of creditors so it cannot be held to be a valid statutory assignment. Appellant contends that the assignment to Jly & Walker Dry Goods Company is not such a "sale, transfer or assignment", as is contemplated by the Bulk Sales Law and that while it is not a valid statutory assignment, it is a valid common law assignment for the benefit of creditors of the assignors, and is legal as against all such creditors, including appellant. While from all that appears from the evidence, Norton Brothers acted in apparent good faith in making the assignment to Jly & Walker Dry Goods Company, yet under the decisions of our courts it cannot be held a valid common law assignment. Since the enactment of the statute regulating assignments for the benefit of creditors, it has been held that a valid assignment can now only be made under that statute and when so made the estate must be administered and distributed substantially in conformity with its provisions. (*Henshett v. Waterbury*, 133 Ill. 327; *Milligan v. Connor*, 13 Ill.App.467). It is probably not altogether accurate to say that our courts no longer recognize common law assignments for any purpose and in that connection it is said in

Smith v. Thompson, 36 Ill.App. 76, that "The title to the property assigned, still passes in this state by the voluntary act of the debtor, as by a common law assignment, but when the assignment is made the statute of Illinois steps in and controls the distribution of the assets." In this case, no attempt whatever was made to comply with the provisions of the statute and it is not even claimed that the statute shall control in the distribution of the assets, so the claimed assignment cannot be held to be valid even as a common law assignment against creditors not consenting thereto.

It is further contended that even if the transaction is not a valid common law assignment, appellant consented to the arrangement and by its action is not precluded from objecting to what was done. This presents a more serious question. To sustain his position appellee relies upon the testimony of the witness Hawkins, representative of J. & J. Walker Dry Goods Company, who testified that on one occasion the president of appellant told him the bank would consent to the arrangement and that in a few days thereafter the cashier told him he would send to J. & J. Walker Dry Goods Company, the bank's acceptance of the arrangement, but a few days later a third official of the bank told him "he had changed his mind". This witness testified he then again went to the president who told him the bank would come into the arrangement if the witness could obtain certain affidavits concerning some cash accounts, which the witness after making an effort, was unable to secure; that he so informed the president and at the same time told him they

were going ahead with the sale just the same and the president replied, "Oh well, I don't think we'll bother you any way." On the day of the sale appellant wrote Jly & Walker Dry Goods Company objecting to the sale and the evidence does not disclose any positive act of appellant signifying its assent to the arrangement of the sale, but does show that on at least two occasions it expressly objected to the same. In *Hillman v. Connor*, 12 Ill. App. 487, in discussing a question very similar to the one now under consideration, the court held that parties occupying the position of appellant here, were not bound to give notice of any objection to what had been done, and the fact that nothing was done by them in affirmance or dis-affirmance of the arrangement was not proof of consent. It further held that in the absence of proof of assent to the arrangement, the objecting creditors were not bound by the assignment, unless either it was valid in law or the creditors' conduct with reference to it, or the property or the other parties in interest had been such as to preclude them from objecting to it. In this case the assignment has been held invalid and the evidence does not show appellant consented to the arrangement, or that its conduct with reference to it, or the property or the parties in interest was such as to preclude it from now objecting.

We are of opinion the trial court erroneously found the rights of property for appellee and the judgment is accordingly reversed and the cause remanded.

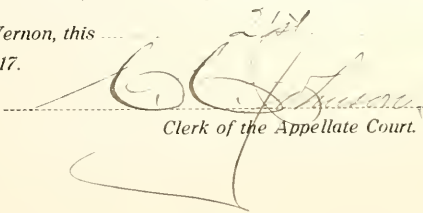
Reversed and remanded.

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court

at Mt. Vernon, this 21st day of April,
A. D. 1917.


Clerk of the Appellate Court.

NOINI

3132

Opinion of the Appellate Court

AT AN APPELLATE COURT, begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March, in the year of our Lord, one thousand nine hundred and seventeen, the same being the 27th day of March, in the year of our Lord, one thousand nine hundred and seventeen.

Present:

Hon. James C. McBride, Presiding Justice.

Hon. Franklin H. Boggs, Justice.

Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the Thirteenth day of April, A. D. 1917, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

Manuel E. Boals,

Appellant

vs.

No. 44

October Term, 1916.

Alexander Wegener,

Appellee

206 I.A. 325

ERROR TO
APPEAL FROM

Circuit

COURT

Madison

COUNTY

TRIAL JUDGE

HON.

LOUIS BERNREUTER



October Term, 1916.

Manuel H. Doals,)	
Appellant)	
v.	)	Appeal from Madison.
Alexander Legener,)	
Appellee)	

Opinion by Ligbee, J.

---000---

This is a bill in equity for contribution filed by Manuel H. Doals, appellant, against Alexander Legener, appellee. The suit was originally commenced as an action in assumpsit for contribution but was transferred to the chancery side of the court and a bill of complaint filed. An issue of fact was made up and the case tried before a jury. At the close of appellant's evidence the court, on motion of appellee, instructed the jury to find the issues in favor of the latter.

In 1900, one A. Lundstrum contracted to build two churches in St. Louis, known as The Salem Church and The Bear Church. He gave the Empire State Surety Company as surety on his bond for the faithful performance of his contracts. The surety company in turn were indemnified by bonds with ^{complainant defendant} appellant and appellee as sureties. Said bonds of indemnity provided among other things, that said sureties would save and keep harmless, said surety company, "from and against every and all claim, demand, liability, cost, charge,

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counsel fee, expense, suit, order, judgment or adjudication whatsoever, which the said Surety Company shall or may for any cause, at any time, sustain or incur, by reason or in consequence of the said Surety having executed said bond or undertaking". Lundstrum after partially completing both churches, became financially involved and practically abandoned the work. The Surety Company after learning this fact notified ^{complainant} ~~appellant~~ of Lundstrum's default and called upon ^{defendant} him and ^{complainant's} ~~appellee~~ to save and keep it harmless. ~~Appellant's~~ son, William J. Boals, went to St. Louis, examined the conditions of the churches and notified ^{defendant} ~~appellee~~ that he and ^{complainant} ~~appellant~~ were expected to protect the Surety Company in the matter. ^{Defendant} ~~Appellee~~ told Boals, Junior, "You go ahead, and if there is any shortage I will pay my portion of it." William J. Boals then took charge of the matter and caused both churches to be completed. Lundstrum had been paid a considerable part of the contract price before he defaulted, and it required several thousand dollars more than the ^{complainant} ~~un-~~ paid portion of the same to complete the churches. ~~Appellant~~ was president of the W. K. Boals Planing Mill Company and his son William J. Boals was the secretary and treasurer. The Planing Mill Company had furnished a considerable amount of the materials used in the building of the churches. After deducting from the total shortage the amount of the Planing Mill Company's account, the sixty day notes of that company were given to the churches for the balance of the shortage. These notes on maturity were paid by the checks of the Planing Mill Company. The amounts of these checks and of the Planing Mill Company's account for materials furnished, were charged

on the mill's books to the personal account of ~~appellant~~ ^{complainant}

~~James H. Meale~~. Lundstrum was adjudged a bankrupt and

~~complainant~~ ^{complainant} secured a dividend from his estate, which he applied on this shortage. ~~Appellant~~ ^{Complainant} also incurred personal expenses in securing this dividend and completing the churches.

This suit was brought to recover from appellee one half of such shortage together with interest thereon and expenses remaining, after deducting therefrom said dividend.]

~~Defendant~~ ^{complainant} Appellee told ~~appellant's~~ ^{complainant's} son in substance to go ahead and complete the work and he would pay his share of the loss, if any. This was in effect, under the circumstances, shown to exist and the relations of the parties, a promise to ~~appellant~~ and was sufficient authority for him to complete the work and appellee should in equity be held to pay his share of all reasonable costs incurred thereby. The question arises whether the fact that the amount of the notes and the Planing Mill Company's account for materials furnished, which were charged to appellant's account on the books of the Mill Company, must be considered the same as though appellant had paid those items in cash. It is claimed by appellee that to enforce contribution between co-sureties, there must be actual payment and satisfaction of the debt by the surety who seeks to enforce the same; that the right of contribution is not complete until there has been a payment of the debt; that the charging of a demand on the account is not a satisfaction or payment of the liability, but at best is simply evidence of it. It is well settled, however, that where one person is obligated to pay money for the use of another, a payment made in any amount is equivalent to

and will be treated as a payment in cash if received as full satisfaction. In *Malston v. Wood*, 15 Ill.1.9, it was said in speaking of such a condition, that "where the payment is received as a complete satisfaction and the debt or obligation is extinguished it is a matter of no moment to the person to whose use the payment was made, whether it was made in money, property or obligation. The benefit to him is the same and his obligation to refund should be the same." In *Meesk v. Phennig* 120 Mich.474, it was held that payment of a judgment on a bond by the check of a company not a party to the suit of which a surety on the bond was a member, the check being charged to such surety on the books of the company, was payment by the surety, entitling him to contribution from his co-surety. When the amount of these notes and the Planing Mill Company's account for materials were charged to appellant's account on the books of the Mill Company, appellee was released from all obligation of payment of the same to the parties to whom they were owing and the transaction must be considered the same as though appellant had paid the items in cash. Appellee, however, should be required to pay his share of only such shortage and expenses as were reasonable and the burden is upon appellant to show what that amount is. 32 Cyc page 350.

While it is true that the verdict of the jury in this case would only be advisory and not binding upon the court, yet no good reason appears from the proofs why the court should have directed a verdict in favor of appellee. The decree of the court that the appellee have judgment in bar of the action and against appellant for costs does not

appear to be warranted by the proofs in this case and it will accordingly be reversed and the cause remanded in order that the amount which should properly be contributed by appellee to appellant, may be ascertained and a decree entered therefor.

Reversed and remanded.

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court

at Mt. Vernon, this...
A. D. 1917.

25th

day of April.

Clerk of the Appellate Court.

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Opinion of the Appellate Court

AT AN APPELLATE COURT, begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March, in the year of our Lord, one thousand nine hundred and seventeen, the same being the 27th day of March, in the year of our Lord, one thousand nine hundred and seventeen.

Present:

Hon. James C. McBride, Presiding Justice.

Hon. Franklin H. Boggs, Justice.

Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the Thirteenth day of April, A. D. 1917, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

206 I.A. 337

Charles Johnson,

Appellee

vs.

No. 53

October Term, 1916.

Robert C. Gould et al,

Appellants

ERROR TO
APPEAL FROM

Circuit

COURT

Wabash

COUNTY

TRIAL JUDGE

HON.

J. C. EAGLETON



October term, 1911.

Charles Johnson,	}	
Appellee		
v.	}	General Iron Works.
Belchoir Leopold, et al,		
Appellants.	}	

Opinion by Higbee, J.

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The declaration in this case consists of two common counts and three special counts. The first special count as amended alleges that on the 5th day of January, 1911, the plaintiff Charles Johnson, appellee here, bargained and agreed to turn over to defendants Belchoir Leopold and Robert C. Gould, appellants here, his stock of groceries, merchandise and fixtures in the city of St. Charles, St. Louis county, of the value of \$2100 for 60 acres of land in Wayne county, Illinois, which defendants stated pretended and claimed were owned by Leopold and were described as the north east quarter of the northwest quarter and the east half of the north west quarter of the northwest quarter of section twelve in township two (2) of range eight (8) east on the third principal Meridian, and that the defendants agreed in consideration thereof to cause to be executed, acknowledged and delivered to the plaintiff a good and sufficient deed of conveyance to said sixty (60) acres of land with the usual covenants of

warranty, subject to a mortgage incumbrance thereon of \$2000; that in pursuance of such agreement plaintiff did on that day turn over the said stock of groceries, hardware and fixtures, but the said defendants although twice requested so to do have wholly failed and refused to execute, acknowledge and deliver to this plaintiff a deed conveying to him the real estate above described and still so refuse and neglect so to do, to the damage of the plaintiff of the sum of five thousand dollars. The second special count is substantially the same. The defendants filed the general issue and also special pleas denying they pretended and claimed Leopold was the owner of the land and that they refused to execute and deliver to plaintiff a deed for the land but averring they offered and attempted to deliver to plaintiff such deed and made repeated efforts to have him accept it. The third special plea alleged the defendants executed and delivered to plaintiff a deed, which by mistake contained an erroneous description, and that as soon as the error was discovered the defendant, Leopold, secured title to himself and executed and attempted to deliver to plaintiff a deed containing the true description and requested plaintiff to accept same which he refused to do. The plaintiff's replication to this third plea expressly denied the averments therein and his replications to the other counts were general. On these pleadings issues were joined and tried before a jury which returned a verdict in favor of plaintiff for \$1200. A motion for a new trial was overruled, judgment entered on the verdict and an appeal taken by the defendant to this court.

Appellee asks for an affirmance of the judgment for the reason the abstract of the record filed herein is incomplete. Leave was however, subsequently given appellants to file an amendment to the abstract and having been filed the objection made by appellee was removed. The deed made by Leipold and delivered to Johnson ^{on} the day the deal was consummated, described the land conveyed as the north-east quarter and the east half of the north west quarter of section twelve, etc. This description omitted 20 acres covered by the contract, to wit, the east half of the north west quarter of the north west quarter, and included some 200 acres not covered thereby. Leipold's source of title was a deed from one Epler, which was turned over to Johnson and contained the following description: The north east quarter and the east half of the northwest quarter of the north east quarter of section twelve. Thus it will be seen that at the time Leipold executed his deed to Johnson, he had title to only 20 acres of the 60 covered by the contract, viz: The east half of the northwest quarter of the north east quarter and the 20 acres were not included in the description in his deed to Johnson. Consequently Johnson acquired title to only part of the 60 acres by virtue of Leipold's deed to him of January 5.

Appellants urge, however, the evidence discloses that within a reasonable time after the mistake in the description was discovered a deed from Epler directly to Johnson was secured, under an understanding with Johnson that he would accept the same, but when tendered he refused to do so; that a short time later Epler made a deed to Leipold,

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and Leopold made one to Johnson, both of which Johnson refused to accept. All of these facts were questions raised by the pleadings and were denied by Johnson on the witness stand. They were questions of fact to be determined by the jury and the verdict in effect determined fact in favor of appellee. The proof was conflicting on these questions and as the jury's finding cannot be said to be clearly against the weight of the evidence, it should not be disturbed by this court. Appellants also contend the verdict is excessive and not based on the proper measure of damages. An examination of the record discloses that counsel during the trial, practically agreed that the measure of damages was the value of the land, and that the court was governed in its rulings by that agreement. Appellants cannot therefore, now be heard to complain of the measure of damages adopted by their consent or admission. *Clemens v. Britten*, 155 Ill.232. Under the rule as to the measure of damages thus followed, the proof as to the value of the land, and the fact that appellant Leopold by his deed of January, 1900, did not convey 20 acres of the 60 covered by the contract, and did not have title to the 40 acres his deed purported to convey, the damages allowed cannot be considered excessive.

Appellants further contend that the proof does not show any joint liability on the part of the defendants and that unless such joint liability is shown the judgment cannot be sustained, under the principle of law that if a judgment against several is set aside as to one, it must be set aside as to all. This contention is based on the claim that the evidence shows Gould was acting in the matter as Leopold's

agent, with Johnson's knowledge, and that an agent is not personally liable where the principal is disclosed. It would be sufficient to say in answer to this contention of appellants, that no plea denying joint liability was filed but it is clearly disclosed by the evidence that a month or six weeks before this transaction Leipold had conveyed the 20 acres in controversy to Gould, who was a real estate agent; that appellee had told Gould he wished to trade his stock of merchandise for a farm and Gould told him he had a farm near Fairfield he would trade for it, but appellee replied he would not trade with a real estate agent; that in a short time Gould informed appellee Leipold had a farm in Wayne county and asked if he would trade with him; that appellee replied in the affirmative, and after some negotiations this deal was consummated. The evidence also discloses that Gould had informed Leipold that Johnson would not trade with Gould, and it was arranged between them that Leipold should make the deal, and if made should destroy the deed to Gould and execute one to Johnson, which was done. The bill of sale was assigned by Leipold to Gould on the day it was executed and Gould took immediate possession of the stock of goods. These facts do not prove the agency of Gould, nor do establish that the transaction was under some kind of an arrangement and understanding between Gould and Leipold.

Appellant further insists that the judgment cannot be sustained under the pleadings. In this connection it is to be noted that the statute of frauds was set up as a defense to the oral contract. The issue so joined by the pleadings and especially by the third special plea and reple-

cation thereto was whether appellants did execute and deliver to appellee a deed to the land described in the contract at the time of the transaction or within a reasonable time thereafter. Evidence was introduced on both sides on this issue and appellants' own indignations seem to have been drawn on this theory. If a party procures the court to declare to the jury the rules of law applicable to the state of facts disclosed by the evidence, and he expects them to return a verdict in accordance with his legal rights under such state of facts, he cannot complain that the facts proven were not within the scope of the allegations of the declaration. Wheeler v. C. & N. W. Ry. Co., 207 Ill. 304; 111. 321; Steel Co. v. Kovak, 184 Ill. 541; Chapman v. City of Springfield, 153 Ill. App. 207. No substantial error appears in the record and the judgment will be affirmed.

Affirmed.

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

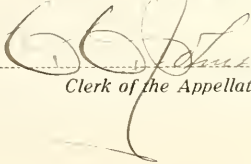
IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court

at Mt. Vernon, this.....

17th

day of April,

A. D. 1917.



Clerk of the Appellate Court.

3137

Opinion of the Appellate Court

AT AN APPELLATE COURT, begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March, in the year of our Lord, one thousand nine hundred and seventeen, the same being the 27th day of March, in the year of our Lord, one thousand nine hundred and seventeen.

Present:

Hon. James C. McBride, Presiding Justice.

Hon. Franklin H. Boggs, Justice.

Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the Thirteenth day of April, A. D. 1917, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

206 I.A. 346

Eugene Lanksford and Linnie

Lanksford,

Appellees

ERROR TO
APPEAL FROM

vs.

No. 59
October Term, 1916.

Circuit COURT

Charles Cruse,

Appellant

Marion COUNTY

TRIAL JUDGE

HON. W. E. WRIGHT

October Term, 1916.

Eugene Lankford, et al,)	
Appellees.)	
v.)	Appeal from Marion.
Charles Cruse,)	
Appellant.)	

Opinion by Higbee, J.

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This was an action brought by appellees, Eugene Lankford and Minnie Lankford, against appellant, Charles Cruse in a justice court to recover \$40 and the use of a stove purchased by them of him. On Appeal to the circuit court of Marion county the case was tried before a jury and resulted in a verdict for \$40 for appellees. Motion for a new trial was overruled, a judgment entered on the verdict and an appeal taken to this court.

Counsel for appellant assigns numerous errors but argues only that there was error in the giving, refusing and modifying of instructions and that the verdict was contrary to the evidence. In the month of June, 1916, appellees purchased of appellant the stove in question for \$40. They supplied \$3.10 worth of cherries on the purchase price, turned over to appellant an account of \$12.50 against a third party and paid the balance in cash. After trying the stove a week or more they notified appellant that it would not bake satisfactorily. He went to their home and looked at himself.

On that occasion it did not bake properly, but appellant contended this was due to a faulty blue. A few days thereafter appellees returned the stove to appellant's store and requested that he pay them their money back. This he refused to do and this suit resulted. After the stove was returned to him appellant had it tested by several women who testified it baked properly. Counsel for appellant complained of the refusal of the court to give the following instruction:

"The court instructs the jury that the law is that a warranty is not a part of a contract of sale, except as a part of the consideration received for the price paid. The vendor's remedy upon a sale is on the warranty, without which he has none, and his right of recovery is limited to the amount of depreciation due to the breach; he cannot lawfully compel the vendor to take back the property and return the price paid."

This instruction is not a correct statement of the law applicable to the facts in proof in this case. It is true that in a contract of sale a warranty may be so added that the vendee must retain the property and recover damages for its breach, but that is not the law when the contract of sale by its terms gives the vendee the right to return the property in case of a breach of the warranty. In the case of an executed contract of sale the true rule is that unless the contract gives the vendee the right to return the property, in case of a breach of the warranty, he must retain it and sue for damages, unless the vendor was guilty of fraud or deceit. *Owens v. Turgeon*, 37 Ill. 366. *Went v. Dunbar*, 63 Id. 512; *Cook v. Lantz*, 116 Ill. App. 472. In this case appellees claim the contract of sale was that the stove should bake to their satisfaction or they should have the

right to return it and receive back their money. Appellant denies he warranted the stove to make to their satisfaction, but testified, "I guaranteed it to make perfectly, but satisfaction was a thing I didn't have any control over. I told them that repeatedly. I told them if it didn't make to the stove back and pay them their money back". By this testimony it is admitted by appellant that the stove was to be returned if it did not comply with his warranty, and the question is what was the warranty and did the stove comply therewith. Under this state of facts it was not error to refuse this instruction.

Appellant's second refused instruction informed the jury if appellee paid appellant \$12.50 after they complained of the stove they could not recover. The evidence tended to show the account of \$12.50 turned over to appellant was not paid to him until after complaint of the stove was made. This account was turned over to him at the time of the purchase in the presence and with the consent of the parties buying it. Appellees then parted with all title to it, and so far as they were concerned it was at that time a payment of that amount on the stove, regardless of when the account was actually paid appellant. As offered, the first and second instructions given for appellant advised the jury in effect that appellees could not recover unless the jury believed from a preponderance of the evidence that appellant acted fraudulently or deceitfully in the sale of the stove. The court modified these instructions to include the right of appellees to return the stove if the warranty provided for the return of it in case of a breach of the warranty. If

the contract of sale gave appellees the right to return the stove in case of a breach of the warranty, an appellant admits in his testimony it did, it is immaterial whether appellant made the warranty fraudulently or in good faith and appellees were not required to prove fraud or deceit, but simply a breach of the warranty. The court's modification of appellant's third instruction simply improved the phraseology of the offered instruction, and was entirely proper.

Appellant also contends that the instructions given in behalf of appellees were erroneous in that they gave undue prominence to particular facts by setting them out for special consideration. They briefly and succinctly told the jury that if they believed from a preponderance of the evidence that the warranty was as claimed by appellees and the stove did not comply therewith and was returned within a reasonable time they should find for the appellees. This was simply a statement of appellees theory of their case and of the law applicable thereto. As held in *Chapman v. Chamberlain*, 113 Ill.489, "It is not error for the court, at the request of the party to state to the jury the theory upon which a case is being tried and then announce the law applicable to such theory and it is the province of the jury to decide whether one theory or another is sustained by the evidence under the law announced by the court." It is also urged that the verdict is contrary to the evidence. The only questions of fact in this case were, what was the warranty in the contract of sale and did the stove comply with that warranty? Appellant claimed the stove was ver-

vented to bake properly. Appellees claimed it was warranted to bake to their satisfaction. Both admitted it was to be returned if not as warranted. It was for one year to determine which warranty was in fact made and whether the stove complied therewith. The evidence as to what the contract of sale was with reference to the warranty is somewhat conflicting, but there is by no means a want of evidence to sustain the verdict, which in effect finds the contract to be as claimed by appellees and that the stove did not comply therewith. Under these conditions this court cannot set aside such finding and as no reversible error appears in the record, the judgment will be affirmed.

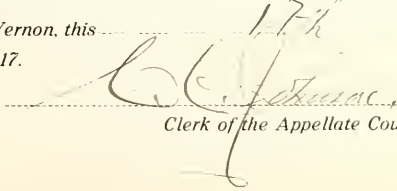
Affirmed.

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court

at Mt. Vernon, this 17th day of April, A. D. 1917.


Clerk of the Appellate Court.

3135

Opinion of the Appellate Court

AT AN APPELLATE COURT, begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March, in the year of our Lord, one thousand nine hundred and seventeen, the same being the 27th day of March, in the year of our Lord, one thousand nine hundred and seventeen.

Present:

Hon. James C. McBride, Presiding Justice.

Hon. Franklin H. Boggs, Justice.

Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the Thirteenth day of April, A. D. 1917, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

E. F. Anderson,

Appellee

vs.

No. 62

October Term, 1916.

A. C. Terhune,

Appellant

206 I.A. 348

ERROR TO
APPEAL FROM

Circuit

COURT

Franklin

COUNTY

TRIAL JUDGE

HON.

CHAS. H. MILLER



Term No. 62.

October Term, 1914.

October Term, 1914.

J. J. Anderson,)
Appellee)
v.)
A. C. Terhune,)
Appellant.)

Opinion by Gibbs, J.

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This is an action of assumpsit brought in the circuit court of Franklin county, by appellee, J. J. Anderson, against appellant, A. C. Terhune, upon the following promissory note:

"\$227.00. Benton, Illinois, Aug. 11, 1914.

Ninety days after date I promise to pay to the order of J. J. Field, Esq., for value received, the sum of two hundred & twenty seven & 00/100 Dollars at Benton, Ill., with interest at the rate of ----- per cent per annum payable ----- annually from ----- until paid. If said note should be collected by suit or foreclosure of mortgage the judgment or decree shall include a reasonable fee for plaintiff's attorney and the said attorney's fee shall become due upon commencement of a suit on this note, or upon the filing of a bill to foreclose said mortgage that may be given to secure this note.

Witness _____ A. C. Terhune (Appellant)

No. ----- Nov. 7, 1914.

This note is not secured by mortgage.
P.O. Address, Benton, Ills.

Anderson, J. J. 1914, 1915.

The declaration contains the common count and a special count upon the note. The general issue and two special pleas were filed. The first special plea averred that the note was not assigned by the payee, Field, to appellant before maturity for valuable consideration; that said note was given only for alleged services of said Field as a licensed physician and that he was not then a licensed physician and that on account thereof said note was illegal and void. The second special plea alleged fraud and misrepresentation on the part of Field in securing the execution of the note, charging that Field purposely and maliciously conspired to appellant and while he was under the influence of the drug and unable to realize what he was doing, executed his signature to the note. Issue was joined by respective filing of motions to each of the pleas. The jury returned a verdict in favor of appellee for \$201. Appellee filed a writ of reformation in the sum of \$5.15 and the court returned judgment for \$206.65.

The witness, W. B. Field, a physician, testified that the note was signed in his office by appellant on the morning of the date thereof and was for fees due him then and there for professional services, and that appellant was free and sane and knew perfectly well what he was doing". On direct examination this witness was asked whose signature was on the back of the note and he replied, "that is my signature". On cross examination counsel for appellant asked the witness, "When did you say you signed your name on the back of this note?" Counsel for appellee objected to this question on the ground that it was not proper cross examination and the

trial court sustained the objection. This ruling of the court is assigned as error.

Appellant testified that at the time the note was executed he was under the influence of morphine administered to him by the witness, Field; that he was unable to realize what he was doing and did not know when he signed the note; that some time in August, 1914, one Aiken found him in the street in an unconscious condition; that he had a conversation with appellee after this suit was instituted in which appellee said he was surety for Field on some note and that this note was assigned to him by Field to secure him for "being surety on that note". The witness Aiken testified to finding appellant in the street, but could not fix the date. The trial court excluded this testimony. Appellee testified that he paid a note of \$1000 on which he was surety for Field and he paid Field \$75; that Field assigned this note to him on one of the first days of November, 1914 and that this was what he told appellant in the conversation testified to by appellant.

It is contended by counsel for appellant that the trial court erred in not permitting him to cross examine the witness Field, as to when he endorsed his name on the back of the note. This was not proper cross examination and the court did not err in sustaining the objection. Neither did the trial court commit error in excluding from the jury the testimony of the witness Aiken as to finding the appellant on the street. The witness could not fix any definite date, and it was not shown to have been at or near the date of the execution of the note.. The question is whether

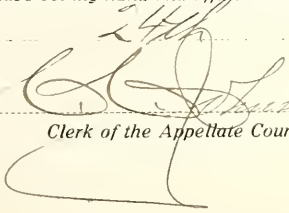
claim not due at the time the action was commenced". A separate suit will have to be instituted if the attorney's fee is to be recovered. (Barlow v. Wm. B. Lee 133.419; Lester v. Woyd supra; Land v. Green 133.420.)

This error however can be cured by appellant filing a remittitur of \$25, the amount included in the judgment for the attorney's fee. The judgment will be affirmed upon appellee filing such remittitur within thirty days, and each party will be required to pay one half the costs in this court. If such remittitur is not filed within thirty days the judgment will be reversed and the case remanded.

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 24th day of April, A. D. 1917.


Clerk of the Appellate Court.

3137

Opinion of the Appellate Court

AT AN APPELLATE COURT, begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March, in the year of our Lord, one thousand nine hundred and seventeen, the same being the 27th day of March, in the year of our Lord, one thousand nine hundred and seventeen.

Present:
Hon. James C. McBride, Presiding Justice.
Hon. Franklin H. Boggs, Justice.
Hon. Harry Higbee, Justice.
CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the Thirteenth day of April, A. D. 1917, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

206 I.A. 350

The People of the State of Illinois,
Defendant in Error

ERROR TO
APPEAL FROM

vs.

No. 63
October Term, 1916.

County COURT

Mary Belew,
Plaintiff in Error

Madison COUNTY

TRIAL JUDGE

HON. HENRY P. EATON



October Term, 1919.

Mary Belew,

Plaintiff in Error

v.

People of the State of Illinois,

Defendant in Error.

}
}
} Error from County Court of
} Madison.

Opinion by Ligbee, J.

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An information was filed by the states attorney of Madison county, charging Mary Belew with "leaving premises while under quarantine", and upon a trial in the county court of that county, she was found guilty by a jury and sentenced by the court to pay a fine of \$10 and costs and to stand committed until said fine and costs were paid.

She has filed the record, together with her briefs and abstracts and brought the case here by writ of error for review, but defendant in error has filed no briefs. The question presented is an important one to the people of the state and we do not feel justified in passing upon it in the absence of a brief on the part of defendant in error.

The judgment of the court below will be reversed pro forma and the cause remanded, under Rule 27 of this court, which provides for such action where the appellee or defendant in error fails to file briefs.

Not to be reported in full.

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I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court

at Mt. Vernon, this

17th

day of April,

A. D. 1917.

Charles C. Johnson

.....
Clerk of the Appellate Court.

3173

Opinion of the Appellate Court

AT AN APPELLATE COURT, begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March, in the year of our Lord, one thousand nine hundred and seventeen, the same being the 27th day of March, in the year of our Lord, one thousand nine hundred and seventeen.

Present:

Hon. James C. McBride, Presiding Justice.

Hon. Franklin H. Boggs, Justice.

Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the Thirteenth day of April, A. D. 1917, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

M. E. Thorne,

Appellee

vs.

No. 75

October Term, 1916.

Southern Illinois Ry. & Power Co.

Appellant

206 I.A. 372

ERROR TO:
APPEAL FROM

Circuit

COURT

Saline

COUNTY

TRIAL JUDGE

HON.

A. W. LEWIS

October 12, 1915.

M. A. Thorne,

Appellee

v.

Southern Illinois Railway

and Power Company,

Appellant

Appeal from Circuit.

Opinion by Higgins, J.

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Appellee, M. A. Thorne, is the owner of two lots fronting on Walnut street in the village of Carrierville in Saline county. In 1915, appellant, the Southern Illinois Railway and Power Company, constructed its line of railroad along front street in front of appellee's property which was occupied by her as a residence. This suit is to recover damages alleged to have been sustained by appellee to her property in the construction and operation of said railroad. The principal damage claimed was that occasioned by excavating in the street. The case was tried before a jury and a verdict in favor of appellee for \$50 was returned. This appeal seeks to reverse the judgment entered on that verdict.

Appellant claims that the trial court committed errors in giving and refusing instructions and in the rulings in regard to the evidence, also that the verdict is contrary to the evidence. Nine witnesses testified in behalf of ap-

v
pellee that the property had been damaged in amount ranging from \$150 to \$500. Appellee's expert placed the damage at from \$600 to \$700. Five witnesses called by appellant testified the property had been increased in value by the fire, but were unable to state to what extent. Two other witnesses testified it had been increased in value from \$180 to \$200 and one that its value had been increased 20%. Appellant contends appellee's witnesses were not sufficiently acquainted with the value of the property in that community to justify their testimony on that subject. In a case such as this, the value of the property need not be established by persons engaged in the business of buying and selling real estate. The examination of these witnesses disclosed they had good knowledge of the value of the property, either by knowing what other property near by had sold for, or from their address and were in some degree qualified. The extent of their knowledge was a matter affecting their credibility and not weight to be given to their testimony. The evidence justified the jury in finding that the property had been damaged to some extent and the verdict of \$50 is not excessive.

It is objected by appellant that instruction number 1 given in behalf of appellee, raised an issue as to whether her "legal right" of ingress or egress be distinguished from her "means" of ingress and egress had been damaged. This instruction is not susceptible of the technical construction given it by appellee, especially when considered in connection with the facts in proof and the other instructions. Counsel also contends appellee's fifth instruction does not require the jury to find the facts therein stated to a preponderance of the evidence. Portions of it read as follows:

permit of this construction, but read as a whole it correctly states the law as to the degree of proof required. It is also urged that appellee's seventh instruction was erroneous for the reason that it informed the jury as to the law if they found the value of the property had been increased "as charged in the declaration". While the practice of referring the jury to the declaration is frequently ✓ been criticised yet it is not reversible error. *U. S. N. Inc. v. Co. v. Patton*, 219 Ill. 214; *Cooper v. Lankford* 211, 10. 164 Ill. 4pr. 581. Appellant's first refused instruction might properly have been given but it is substantially covered by the third, fourth and fifth instructions given in its behalf. It was not reversible error to refuse appellant's second and fourth refused instruction as the jury had ✓ been in other instructions, fairly instructed as to damages and benefits as defined therein. Appellant's fifth refused ✓ instruction advised the jury that any damages to appellee's premises must be considered as a damage to her property as a whole, and that an inconvenience of ingress and egress to a portion of the premises is not necessarily a damage to the whole of the premises. While this statement as an abstract ✓ proposition of law has been approved by the courts of this state in certain cases, yet it was not error to refuse it in this particular case, for the reason the property here involved is small in area and all of it used as one residence ✓ property, therefore a damage to any part of it would almost necessarily be a damage to the whole of it. The instructions must be considered as a series not as singly and al- ✓ though the instructions in this case are not in every respect

formal and accurate, yet taken as a whole they fully and fairly advise the jury of the law applicable to the facts in issue and afford no reason for a reversal of the judgment.

It appearing that substantial justice was done here, and no reversible error having been called to the attention of this court, the judgment will be affirmed.

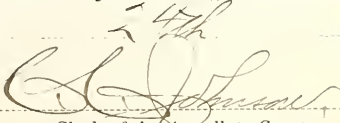
Affirmed.

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above-entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court

at Mt. Vernon, this 14th day of April,
A. D. 1917.


Clerk of the Appellate Court.

NOINI

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3144

Opinion of the Appellate Court

AT AN APPELLATE COURT, begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March, in the year of our Lord, one thousand nine hundred and seventeen, the same being the 27th day of March, in the year of our Lord, one thousand nine hundred and seventeen.

Present:
Hon. James C. McBride, Presiding Justice.
Hon. Franklin H. Boggs, Justice.
Hon. Harry Higbee, Justice.
CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the Thirteenth day of April, A. D. 1917, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

206 I.A. 374

Anthony Bohm,
Appellee

ERROR TO
APPEAL FROM

vs.

Circuit COURT

No. 84
October Term, 1916.

Hunter Dalton,
Appellant

Madison COUNTY

TRIAL JUDGE

HON. J. F. GILHAM

October Term, 1916.

Anthony Lohr,)	
Appellee)	
v.	)	Appeal from Madison.
Hunter Dalton,)	
Appellant)	

Opinion by Wigbee, J.

---000---

Appellee, Anthony Lohr, recovered a judgment for \$1,446.50 against appellant in the circuit court of Madison county, in an action on the case, brought to recover damages for personal injuries sustained by him on March 24, 1916 by being struck and injured by an automobile operated by appellant.

The declaration in the case consists of five counts, referred to in the arguments as two original and three additional counts. The first count charges general negligence and avers that while appellee was passing along Madison avenue near its intersection with fourth street in the village of Madison, appellant so carelessly and negligently operated his automobile along said Madison avenue that appellee was struck and injured by the same while he was in the exercise of due care for his own safety. The second count charges general and wilful negligence. The third or first additional count is based upon section sixteen of the Motor Vehicle Act of Illinois and avers that appellee was struck by appellant's automobile and injured while appellant was operating same.

along Madison avenue and not observing or complying with any of the requirements of said section, while appellee was in the exercise of due care for his own safety. The fourth or second additional count is based upon section 100 of the Motor Vehicle law and avers that appellee was struck and injured by appellant's automobile, while appellant was driving same along Madison avenue in violation of said section ten and that he was driving same at the rate of fifteen miles per hour at the time of the accident and that appellee was in the exercise of due care for his own safety. Both the third and fourth counts aver that Madison avenue at and near its intersection with fourth street passes through the closely built up business portion of the village of Madison. The fifth or third additional count charges appellant with reckless and wilful negligence. The case was heard before a jury, which returned a verdict in favor of appellee.

The evidence shows that the accident in question occurred about five o'clock P. M. March 24, 1918 at the intersection of Madison avenue and fourth street in the village of Madison. Madison avenue runs north and south, and is intersected by fourth street running east and west. Fourth street is not paved. In the center of Madison avenue is an unpaved portion about twenty feet in width, in which are located two street car tracks. This portion is filled with chat or gravel and is used exclusively for street car traffic. On each side of this unpaved portion Madison avenue is paved with wooden blocks and each paved portion is about twenty feet wide. The western paved portion is used exclusively for vehicles going south and the eastern paved portion

for vehicles traveling north over the avenue. Street cars going north over the avenue stop at the north side of its intersection with fourth street and persons waiting for north bound cars were in the habit of standing on the sidewalk at the north east corner of the intersection until a car approached the corner and would then walk across the eastern paved portion of the avenue to the track and board the car. Appellee lived at Manooki, some distance north from this intersection, and was employed as a carpenter at the American Car and Foundry Company, whose plant is located some distance east from the intersection of Madison Avenue and fourth street. On March 24, 1916 he quit work about 4:40 P. M. and, went with some twelve or fifteen of his fellow workmen, to the north east corner of the intersection of Madison Avenue and fourth street to wait for a north bound street car. From fourth street south Madison Avenue is straight for a distance of three or four blocks and there is nothing to obstruct the view for that distance. A street car spoken of in the evidence as "The Yellow Car" was seen approaching from the south and by the time it had reached the middle of the block between third and fourth streets most of the men waiting had stepped down from the sidewalk and started west across the pavement to the car tracks to board it. Several witnesses testified that appellee was next to the last to leave the sidewalk and the witness Wichter the last. As the men reached the car track they stood along the track some little distance, and awaited the car. Appellee had not gone farther than half way across the pavement when he was struck by appellant's automobile. The machine struck the dinner pail of the witness Wichter and was just behind appellee, and knocked

THE UNITED STATES OF AMERICA
DO hereby certify that
the following is a true and correct
copy of the original as the same
exists in the records of the
Department of the Interior
at Washington, D. C.
this 10th day of June, 1901.
DEPARTMENT OF THE INTERIOR
BUREAU OF LANDS
WASHINGTON, D. C.

it out of his hand. Appellant and the witness McCormick were in the automobile. Appellee testified that as he started off the sidewalk he looked to the south and did not see any automobile and did not know what struck him. One of the men waiting with appellee testified they heard no horn or other warning sound of the approach of the automobile and that the first they saw or knew of it was when one of their number, "hollered"; that the machine was then close upon them, running at a speed estimated by four of them at from twelve to twenty miles per hour, and that in order to get out of the way they were compelled to move quickly or jump. Several of these witnesses testified that appellee was knocked several feet and then dragged a further distance. Two of them, shortly after the accident, measured the marks on the pavement where appellee had been dragged and found they extended for 42 feet. The motorman of the street car which the automobile passed just before reaching Fourth street, testified the machine was traveling about ten miles per hour when it struck appellee, and that if a horn or other signal was sounded he did not hear it. A policeman testified that when the automobile passed Third street, a block south, it was traveling about ten miles per hour. Appellant testified that when he passed Third street he was traveling about 10 to 12 miles per hour; that he slowed down as he approached Fourth street and was not running more than six or eight miles per hour when he struck appellee; that when some distance down the avenue he saw the crowd of men waiting for the car, but did not see appellee until the latter started immediately in front of his machine; and that he stopped his car in less than a foot and did not drag appellee;

that as he approached Fourth street he began to sound his horn and continued to sound it until the accident happened. The witness McCormick, who was riding with appellant in the automobile, corroborated the testimony of appellant as to the sounding of the horn and the speed of the machine. While appellee was on the witness stand he became sick or fainted in the presence of the jury, and a short recess was taken, after which appellant for that reason asked for a continuance of the case over the term, but the court overruled the motion.

Appellant has assigned numerous errors as grounds for a reversal of the judgment in this case, but as only four are mentioned in his brief and argument, the others are deemed to have been waived and will not be considered by the court. (Marcierz Polska etc. v. Czarnecki 272 Ill.14; Sullivan v. A.T.& T.F.R.R.Co. 262 Ill.317.) The first assigned error discussed by appellant in his argument is that the evidence does not show that immediately prior to and at the time of his injury, appellee was in the exercise of ordinary diligence for his own safety; that to have been free from contributory negligence when crossing the pavement at the time in question, appellee should have looked south along Madison avenue before leaving the sidewalk and have ascertained whether any vehicle was approaching. Appellee testified that he did so look and saw no automobile and the two other witnesses testified that they also looked down Madison avenue to the south before or just after stepping off the sidewalk and saw no machine. All the fellow workmen of appellee who testified, stated that the first they knew of the automobile was when a witness "hollered" and that they then jumped to get out of the way of the machine. In this they

are corroborated by the appellant's witness, Longmire, who testified that some one in the crowd called and the appellee stopped only a few feet in front of the automobile and was struck. No witness save appellant and his companion, McCormick, testified that any warning of the operation of the machine, was given. But in any event it cannot be said as a matter of law that failure to look and listen is negligence per se under all circumstances. It is a question of fact to be submitted to the jury and shown by proof of the circumstances surrounding each particular case. (C.B. 7, M.R.Co. v. Pearson, 104 Ill.385) Whether a person is at fault in failing to look and listen depends upon the circumstances in proof in the particular case and is a question of fact to be determined by the jury. The proof in this case justified a finding by the jury that at the time of the accident, appellee was exercising due care for his own safety.

The second alleged error discussed by appellant is that the evidence does not show that he was negligent in the operation of his automobile at the time of the accident. The witnesses testified that at the time of the accident appellant was driving his machine at a rate of from twelve to twenty miles per hour at a place where the statute provides in effect that a speed in excess of ten miles per hour is prima facie negligence. A law providing that the running of a motor vehicle at a greater speed than ten miles per hour through the closely built up business portion of a city or incorporated village is not a license or permission to run such vehicle at that rate of speed, if that rate is unreasonable

under the circumstances of the particular case. (Morris v. Washburn 157 Ill.App.532). The proof about this case accident occurred at a place and under circumstances where a speed of even less than ten miles per hour is reasonably to be found to be great if not willful negligence. Appellant's negligence on the occasion in question is clearly shown by a preponderance of the evidence.

The trial court committed no error in refusing to continue the case when a witness fainted or became sick upon the witness stand. There is no contention that the illness of appellee was feigned and if not it was a matter over which he had no control. The following instruction was given on this subject at the request of appellant: "The court instructs the jury that any sympathy you may have for the plaintiff, because he fainted or became sick while upon the witness stand, must not be permitted to enter into your deliberations, as sympathy is a thing that is foreign to this case, and must not be considered by you. Appellant does not claim that the verdict is oppressive or is the result of sympathy, passion or mistake and as he does not appear to have been harmed by the accident the trial court did not err in refusing the continuance.

Appellant further contends the trial court erred in giving the following instruction in behalf of appellee: "The court instructs the jury that it is the law in Illinois that no person shall drive a motor vehicle upon any public highway in this state at a greater speed than is reasonable and proper, having regard for the traffic and the use of the way, or so as to endanger the life or limb of any person." Appel-

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lent does not contend that the instruction is not a correct statement of the law, but claims it is proper to give an instruction stating an abstract principle of law without applying the law stated to the facts in the case. It has been held in numerous cases in this state that no error is committed by giving an instruction substantially in the language of the statute, and this instruction complied with that rule. (Hessler v. Blackburn 157 Ill. App. 502; Ward v. Meredith 200 Ill. 66).

The verdict in this case is supported by the evidence, no reversible error appears upon the record and substantial justice appears to have been done, therefore the judgment will be affirmed.

Affirmed.

Not to be reported in full.

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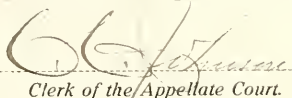
I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and, affixed the seal of said Court

at Mt. Vernon, this.....
A. D. 1917.

20th

day of April.


Clerk of the Appellate Court.

3149

Opinion of the Appellate Court

AT AN APPELLATE COURT, begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March, in the year of our Lord, one thousand nine hundred and seventeen, the same being the 27th day of March, in the year of our Lord, one thousand nine hundred and seventeen.

Present:

Hon. James C. McBride, Presiding Justice.

Hon. Franklin H. Boggs, Justice.

Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the ^{Eighteenth} ~~Thirteenth~~ day of ^{June} ~~April~~, A. D. 1917, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

Otto Freise,

Appellee

vs.

No. 5
MARCH
October Term, 1916.

Metropolitan Life Insurance Co.,

Appellant

206 I.A. 404

ERROR TO
APPEAL FROM

City

COURT

East St. Louis

COUNTY

TRIAL JUDGE

HON.

W. M. Vandeventer



Term No. 5.

In the Appellate Court

Page 1.

of Illinois, Fourth District

March Term A. . . 1917.

Otto Kreise,
Appellee.

vs.

Metropolitan Life Insurance
Company,
Appellant.

}
} Appeal from the City Court
} of East St. Louis, Illinois.

Leaside, E. J.

Upon a trial had in the City Court of East St. Louis, judgment was rendered in favor of appellee for \$336.00 and costs to reverse which this appeal is prosecuted.

It appears from the record in this case, that on October 13, 1914, the appellant issued its insurance policy No. 49719320 upon the life of John E. Kreise and named his brother Otto Kreise as beneficiary therein. The premium required to be paid was fifteen cents per week; subsequently other policies of insurance were issued, one upon the life of Mary Kreise, which required the premium of ten cents per week, and one upon the life of Otto Kreise, which required the premium of fifteen cents per week, and the three policies required a total premium of forty cents per week. A premium receipt book was issued by appellant containing the number of each policy, the name of the insured therein and the amount of the premium due accordingly on each policy, and from that time the accounts of the dues and payments of the three policies were carried in one account and in one receipt book. It appears that this receipt book was retained by the insured and as payments were made from time to time

the date when the premiums and the amount were paid was receipted for in this book by the agent to whom such payment was made.

The policy in question here contained a provision that it was incontestable after two years, also a clause as follows: "A grace of four weeks shall be granted for the payment of every premium after the first during the time the insurance should continue in force. If death occurs within the days of grace the over-due premium shall be deducted from the amount paid hereunder, but neither this concession nor the acceptance of any over-due premium shall create an obligation on the part of the Company to receive premiums which are in arrears over four weeks. Should this policy become void in consequence of non-payment of premium it may be revived if not more than fifty-two premiums are due upon the payment of all arrears and the presentation of evidence satisfactory to the Company of the sound health of the insured."

It also appears from the conditions of the policy that, "Its terms cannot be changed or its conditions varied, except by a written agreement signed by the President or Secretary of the Company, therefore agents, (which term includes Superintendents and Assistant Superintendents,) are not authorized and have no power to make or alter or discharge contracts, waive forfeitures or receive premiums on policies in arrears more than four weeks, or to receipt for same in the receipt book, and all such premiums given to an agent shall be at the risk of those who pay them and shall not be credited upon the policy, whether entered in the receipt book or not. If this policy is, or shall become void,

all premiums paid shall be forfeited to the company, except as provided under privileges and concessions to the policy holders." The premiums were usually collected by agents of appellant coming to the home of appellee, at which time the money was always ready, but the agent said he was always collecting it in arrears. The premium was usually collected within the four weeks of grace allowed by the policy, except that in several instances, three or more at least, the money was collected and receipted for in the book after the expiration of the four weeks of grace and the policy was thereafter continued as if the premium had been paid in time and within its provisions. The assured, John A. Freise, died on June 3, 1916, and at the time of his death the premium was about two weeks more than the four weeks overdue. On June 3 the deputy superintendent of appellant called at the home of appellee to collect the premiums upon these policies, at which time appellee informed the agent of appellant of the death of the assured, John A. Freise, and the agent then refused to accept any money upon the policy in question, so the appellee went to the office of appellant in St. Louis and paid it and obtained a receipt, but said nothing about the death of the assured.

Many errors have been assigned, but only one question is urged and argued by counsel for appellant to reverse this judgment. It is insisted that as the assured neglected to pay the premium within the four weeks of grace allowed by the terms of the policy that the policy became forfeited and appellee had no right to recover thereon. It is said by counsel that where a time is fixed in the policy for the payment of the premium and the payment within that time is

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stipulated as one of the conditions upon which the policy shall continue in force, that a failure to make such payment forfeits the policy, and cites in support of this contention the case of *Heston v. State W. L. Insurance Co.*, 124 Ill. 50. He recognizes that where a policy of insurance requires a premium to be paid within a prescribed time and such premium is not so paid, that the policy becomes forfeited, unless there are conditions and circumstances showing a waiver of such forfeiture, and it is contended in this case that inasmuch as the assured had failed to pay several premiums, three or more, within the four weeks of grace, and that notwithstanding such failure the appellant had not forfeited the policy, but accepted the premium and continued it in force, that the assured had a right to rely upon the fact that the appellant would not forfeit the policy by reason of such default in payment. If the appellant intended to rely upon the clause giving it a right to forfeit the policy for non-payment within the weeks of grace, then it should not, by its conduct, have led the assured to believe that such forfeiture would not be enforced. It is said by the Supreme Court of this State, "It is obvious that the provision in the policy providing for a forfeiture for a non-payment of the annual premium was incorporated in the contract for the benefit of the insurance company. The policy did not necessarily become void if the premium was not paid when due. The company had the undoubted right to waive the forfeiture if it saw proper, and dispense with a prompt payment of the premium at the time it was due. If this has been done by the insurance company in this case, then, notwithstanding the contract declares the policy void if the premium is not

paid when due, the company cannot avail of the defense. If the practice of the company, and the course of dealing with the insured undertakers known to the insured, has been such as to induce a belief that so much as the contract as provides for a forfeiture in a certain event will not be insisted upon, the company will not be allowed to set up such forfeiture as against one in whom their conduct has induced such belief. Illinois Life Acn. v. Bell, 128 Ill.452.

It further appears from the evidence in this case that when the appellee went to pay the premium after the death of the assured, that the policy had not been forfeited, but so far as the records of the office of appellant disclosed it was still in force and the premium was accepted. This was evidence that the appellant was not relying upon the failure to make prompt payment as a forfeiture of the policy. At other times when the assured had failed to make payment they did not exact of the assured a death certificate, but continued to accept the dues without requiring the assured to comply with the terms of the policy. It is further said by the Supreme Court in the case of Illinois Life Acn. v. Bell, supra, that, "After the premium was first due, and on July 2, they wrote to the insured as he failed to continue the policy in force to remit the amount of the premium. This letter clearly shows that the company had not elected to forfeit the policy for the failure of appellee to pay the premium when due, but that the right of forfeiture reserved in the policy had been waived. And so also, the testimony of the above named witness clearly tends to prove that at the time he called at the office the company had not elected to forfeit the policy." Several authorities have been cited by counsel for appellant to the effect that the payment of

an over-due premium, after the insured is dead, is not a waiver of anything, and where the premium is not paid within the days of grace, the policy will lapse and become void, or if a stated time is given in which to make payment, that it must be made within that time. We think that may be true in cases where there has been an extension for a specified time, and it is also insisted that a forfeiture cannot be fixed, except by an agreement signed by certain officers of the Company, as provided in the policy. It has been said by this Court in commenting upon a similar clause in the one contained in this policy test, "The said condition was inserted for the benefit of the insurer and like any other clause or condition of the policy could be waived by the company. The provisions of the condition had reference only to express condition of waiver of forfeiture, and not to a waiver claimed to exist by reason of act and conduct inconsistent with an intention on its part to waive the condition. *Bennett v. Union Central Life Insurance Co.*, 133 Ill. 429. *Metropolitan Life Insurance Co. v. Sullivan*, 112 App. 627. *Illinois Life Assn. v. Cook*, 100 Ill. 429.

It is a well recognized doctrine of the courts of this state, that forfeitures are not favored and ^{never} will be enforced unless the evidence is clear that such was the intention, and where the conduct and dealings of the insurance company with the insured is such as to create in the insured the belief that a forfeiture will not be insisted upon, then such insurance company will be estopped from taking advantage thereof.

It appears to us that the evidence in this record was sufficient to warrant the jury and Court in finding that the

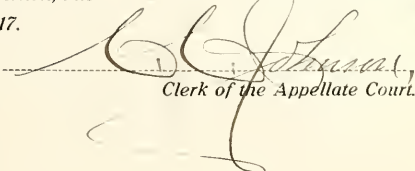
appellant by its conduct had waived any right it may have had to insist upon a forfeiture of this policy, and that there was no error in rendering a verdict and judgment for the appellee, and the judgment of the lower court is affirmed.

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court

at Mt. Vernon, this... 21st day of June
A. D. 1917.


Clerk of the Appellate Court.

Opinion of the Appellate Court

AT AN APPELLATE COURT, begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March, in the year of our Lord, one thousand nine hundred and seventeen, the same being the 27th day of March, in the year of our Lord, one thousand nine hundred and seventeen.

Present:

Hon. James C. McBride, Presiding Justice.

Hon. Franklin H. Boggs, Justice.

Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the ^{Eighteenth} ~~Thirteenth~~ day of ^{June} ~~April~~, A. D. 1917, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

206 I.A. 414

Henriette Dannenberg,

Appellee

vs.

No. 15
March Term, 1917
~~October Term, 1916~~

George Rahn,

Appellant

ERROR TO
APPEAL FROM

Circuit COURT

Randolph COUNTY

TRIAL JUDGE

HON.

J. F. GILLHAM



Term No. 15.

In the Appellate Court,
Fourth District.

Agenda No. 19

March Term, 1917.

Henrietta Dannenberg,
Appellee. }

vs. }

George Kahn,
Appellant. }

Appeal from the Circuit Court
of Randolph County, Illinois.

McBride, F. J.

Appellee recovered a judgment in the court below for seven hundred dollars, which the appellant seeks to reverse by this appeal.

The declaration in this case is in the usual form of trespass and charges George Kahn, on the 21th day of May, 1915, with force and arms, in the County aforesaid, assaulted the plaintiff and with great force and violence drove a certain motor vehicle or automobile against a buggy in which the said plaintiff was then and there riding and by means whereof the plaintiff was then and there with great violence thrown from said buggy to and upon the ground and injured.

The evidence in the case is quite conflicting. That of the appellee tends to show that the appellee lived about five miles south of Red Bud, Illinois, and that she and her son Walter Dannenberg were on their way home and as they were traveling south and were out of Red Bud the distance of about one mile they were overtaken by an appellant who was driving an automobile; that the appellant without any warning or signal drove his car on the left of appellee's buggy and that appellee attempted to pull out but could not do so.

That the machine hit the front wheel of the buggy and turned it over in the ditch, threw the appellee and her son out of the buggy and injured the appellee. The appellee's claim is that the machine struck the hub of the buggy wheel and so dented it that you could not get the lap off. Appellee further claims that the road to the left was in a passible condition. It further appears from the evidence that the appellant did not stop his machine but drove on as though nothing had happened and that after reaching their home the son of appellee called up appellant by telephone and asked him if he knew what had happened and that the appellant replied that he did not give a damn what happened. It further appears that one of the bones of the arm of appellee was broken by reason of this accident and that she incurred considerable expense in endeavoring to be healed. It also appears that there was a buggy behind that of the one in which appellee was riding that was being driven by Marshal Budd, and he says that as appellant passed him driving the car that appellant said, "I will show you". He also says that the driver of the buggy in which appellee was riding attempted to pull out but the machine hit the buggy and turned it over, and other witnesses of appellee tended to sustain this theory of the testimony. The appellant and those riding with him in his car, being three or four in number, all testified that the car did not hit the buggy but that they passed by, and while they are not able to say how the buggy was turned over, as they claim they did not see that, yet they all do say that the car never struck the buggy, and that they were not near enough to strike it. Some of the witnesses testified that the machine was forty feet away

from the buggy before it turned over and that the machine did not cause the buggy to turn over but that the horse, not scared and turned the buggy over.

It is contended by counsel for appellant that the verdict and judgment in this case cannot be sustained because the declaration is based upon the theory of a trespass, and the instructions upon the theory of negligence. It seems to us that the appellant is sustained in his contention, by this record, and that the judgment of the lower court will have to be reversed because, first.- That the appellee by her testimony claims, and her testimony tends to show, that as appellant passed by the buggy that the car struck the wheel of the buggy and turned it over, and there are some expressions which tend to show indifference upon the part of appellant as to the results.

The appellee obtained from the court the following instruction, "The court instructs the jury that if from all the evidence in this case they believe that the defendant at the time and place of the alleged accident did not manage his automobile with the care and attention that a reasonably careful man would have managed it, and if they further believe that the accident would not have occurred had the defendant used reasonable care in managing his machine at the time of the alleged accident then their verdict should be for the plaintiff". This instruction is clearly erroneous. The declaration charges in effect that the appellant intentionally struck the wheel of the buggy but this instruction provides that although he might not have been guilty of assaulting the plaintiff in the manner charged in the declaration, yet if he was guilty of negligence that the appellee

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was still entitled to recover. The issue in this case was as to whether or not the appellant was guilty of an assault with force of arms as alleged in the declaration, but the instruction is not predicated upon this issue but upon the issue of negligence, which is erroneous. *Farney vs. Village of Melvin*, 130 App., 203, and cases there cited. It is said by counsel for appellee that the case was tried by both parties upon the theory of negligence. We do not so read the record. The instruction directs a verdict and even if given upon this theory it would not be correct as it puts the element of due care upon the part of the plaintiff. If the appellee was seeking to recover simply for the negligence of appellant then it would be the duty of appellee to show she was at the time in the exercise of due care for her own safety, and this element should have been included in the instruction. There was some evidence in the record tending to show that the appellant as he came near the buggy sounded a warning to the driver of appellee's buggy but that appellee and the driver paid no attention thereto and made no effort to get out of the road, so that we think it is important, even if tried upon the theory of negligence, that the question of due care of the plaintiff should also have been submitted to the jury; but the charge in the declaration did not warrant a verdict for mere negligence.

It is said by counsel for appellee that this case is simply a variance, if anything, and should have been taken advantage of on the trial, and that the appellant procured an instruction advising the jury that plaintiff cannot recover in this case if the buggy in which plaintiff was riding was accidentally struck by defendant's automobile while

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he was trying to pass such buggy, without the fault of the defendant. We do not regard this as a variance but rather as a declaration upon one theory and an attempt to recover by the instructions upon another; and the instruction given by the court at the request of the appellant cannot be regarded as an effort to try the case upon the theory of negligence because it is a complete answer to the charge of assault with force and arms if the appellant accidentally struck appellee's buggy.

It is also claimed by appellant that the court in the first and second instructions given at the request of appellee assumed that there was a collision between the machine and the buggy, and we think that these two instructions are subject to the criticism and are erroneous in that respect. The evidence and theory of the appellant upon the trial was that the machine never struck the buggy but the horse became scared and turned the buggy over, after the machine had passed them a distance of forty feet or more. The evidence was quite conflicting upon that question and the instruction should have been accurate and should not have assumed that a collision did occur.

There are other objections made and urged by appellant but we do not regard it as necessary to comment upon them as there will have to be another trial in this case.

We are of the opinion that the court acted in the giving of the instructions as they claimed and for that reason the judgment of the lower court is reversed and the cause remanded.

Very respectfully,

Not to be reported *in full*.

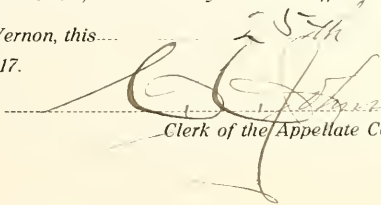
I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court

at Mt. Vernon, this....

25th day of April,

A. D. 1917.


Clerk of the Appellate Court.

3152

Opinion of the Appellate Court

AT AN APPELLATE COURT, begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March, in the year of our Lord, one thousand nine hundred and seventeen, the same being the 27th day of March, in the year of our Lord, one thousand nine hundred and seventeen.

Present:

Hon. James C. McBride, Presiding Justice.

Hon. Franklin H. Boggs, Justice.

Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the ~~Thirteenth~~ ^{Eighteenth} day of ~~April~~ ^{June} A. D. 1917, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

Gus P. Emmerich,

Appellee

vs.

No. 25
March Term, 1917
~~October Term, 1916.~~

Joliet Oil Tractor Co.,

Appellant

206 I.A. 415

ERROR TO
APPEAL FROM

Circuit COURT

St. Clair COUNTY

TRIAL JUDGE

HON.

LOUIS BERNHUTER



Term No. 25.

In the Appellate Court,

March Term, 1916

Fourth District.

March Term, 1917.

Aug. F. Scherich,
Appellee.

vs.

Abraham Brown et. al. Fair County.

Meliet Oil Tractor Co.,
Appellant.

Corrigan, J. J.

The appellee recovered a judgment in the court below for \$865.00 and costs of suit, to reverse which the appellant prosecutes this appeal.

It appears from the record in this case that on September 3, 1915, the appellee placed an order with the Gundlach Machinery Company of Belleville, Illinois, as agent of appellant, for one of its tractors called "Steel Mule". The price of the machine was to be \$865.00, cash. F. F. Scherich, Illinois. One hundred fifty dollars was paid in cash and for the balance the appellee gave his notes. The contract entered into between appellant and appellee with reference to the sale of this machine, among other things provided, that the appellant agreed that when properly managed and adjusted the tractor will have sufficient power to develop more than thirteen horse power at the draw bar and the engine will develop thirty horse power on the belt. That the power developed by this machine at the draw bar is sufficient under favorable conditions to draw three mold-board plows over six inches deep in stubble plowing where the ground is of average tenacity compared to the country in

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general; also guaranteeing that the machine under favorable conditions could be connected with and made over to standard makes of plows, mowers, planters, disc and other makes of farming machinery; and further provided that if the machine when properly run got and rejected cannot fulfill this guarantee in any point herein stated that appellant would either arrange the purchase of a machine so that it can fulfill the guarantee or give the purchaser a machine which does, or take back the machine sold and return purchaser's money, plus transportation charges from shipping point. It was also further provided in said order as that in the machine did not fulfill the guarantee that the appellant was to be notified in writing within three days after the arrival at destination, and that the lack of such notification shall be construed that the machine fulfills the guarantee herein stated.

It further recites from the evidence that the order was received and accepted by appellee on September 7, 1918, and the machine shipped but did not arrive at its destination until the 17th of September, and was not unloaded until the 18th, at which time it was taken to the farm and appellee plowed some with it upon that day and a little more later but claimed that the machine did not work well; that it failed to develop the horse-power guaranteed and that the wheels would slip when working and the tractor would turn over, and on September 28, 1918, the appellee caused the following telegram to be sent to appellant, "Your tractor does not fulfill the guarantee, in this, it does not develop sufficient horse-power at draw bar to cross dead furrow or uneven ground and pull plow attached. It falls and digs in and when running along a furrow or in turning, if one

1. The first part of the document is a list of names and their corresponding numbers. The names are written in a cursive script, and the numbers are written in a simple, bold font. The list is organized in a single column, with each name and number pair on a new line.

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front wheel and crawler gets in furrow machine tilts over on side. The purchaser refused to keep it and you are requested to make it work or take back the machine. Immediately upon receipt of this telegram the appellant sent its agent, George Irwin, to appellee's place to examine the machine and fix it so that it would work. The testimony of appellee's witnesses tends to show that this agent could not operate the machine; that the wheels would slip and that it failed to develop the proper power to draw three fourteen inch mould-board plows and that it would turn over and that it did so with the agent and the agent started to appellee that there would have to be an extra wheel and an extra or different lug from that in use placed upon the machine to make it work and promised to forward the necessary repairs to make the machine do good work but the repairs were not furnished. The appellee waited until October 4, 1918, for appellant to furnish the needed repairs and then instituted this suit to recover the money which he had paid and the value of the notes that he had given to appellant. The appellant's testimony tends to show that if the machine was properly managed that it would do the work guaranteed; and further tends to show that when the agent Irwin was at appellee's place that the machine did good work and that it needed no repairs.

The appellant has assigned several errors but we will only notice such of them as have been argued by counsel and will dispose of them in the manner presented by appellant in his argument.

It is argued that no witness testified that when the tractor was properly adjusted and managed it did not have

the power to do the work specified in the contract. The testimony of appellee and his witnesses is that it failed to work, that it lacked the power to draw the plows, that the wheels slipped and that the machine under reasonable conditions turned over. Also that when appellant sent the man Irwin there to test the machine and get it in proper condition for work that it failed to work for him and failed in his hands to develop the proper power and the wheels slipped and the machine turned over, even under his management. It is true that he in his affidavit states that it worked properly and fulfilled the guarantee but the evidence of several witnesses who were present contradicts his statement and as this was a question of fact we feel that the finding of the jury is conclusive.

It is next argued that the contract required that if the machine failed to work, notice should be given within three days and that the notice was not given until after the expiration of five days from the arrival of the machine. In other words, that the notice was not given in the time required by the contract. We do not regard this point as well taken for the reason that when the notice was given the appellant sent its agent to appellee's home to adjust the machine and try to make it do good work and this was a ^{waiver} of the time of notice required by the contract.

It is next suggested that Irwin upon his return from Belleville reported that the machine had been righted and that it plowed all right. Any report made by Irwin to the appellant would, in our judgment, be in the nature of hearsay testimony and incompetent, but even if such were competent there is sufficient testimony to have warranted

the jury in finding that the tractor did not work all right even in the hands of the expert agent.

It is also claimed that the testimony of Peterson who had operated a similar machine for several years, and the fact of the machine having been tested in the factory were sufficient to show that this machine was fit for the work and that it did in fact work in a properly loaded. It is true that if the jury had believed the testimony of Peterson, and affidavit of Irwin, then their verdict would probably have been otherwise but they seemed to have taken the testimony of the witnesses on appeal, which showed that it did not work.

Again, appellant contends that appellee should have tried the tractor out again after Irwin left and again reported to appellant if the machine did not work. We can see no reason why appellee should have done this, if his testimony is true that the machine did not work for the agent, Irwin, as the appellant's agent and knew that the machine would not work and knew that it needed certain repairs which he promised, according to appellee's testimony, to forward and did not do it.

It is next contended that there was no offer to return the tractor and for that reason there could be no recovery. It is true that there is no offer shown by the testimony, except that contained in the telegram, which told the appellant to either come and fix the machine or take it back. If the machine failed to work we do not believe that appellee would be required to return it to Joliet, as appellant held by its contract to feed the machine back if it did not work; and in this same connection counsel

asks the question, "In whom is the title to the machine", and argues that if this judgment is allowed to stand that the appellee will have both the machine and the money. He does not so understand the law. If appellee is admitted to retain his judgment then he certainly could not under any circumstances claim title to the property; moreover, the tractor was not paid for in cash and the agreement entered into provided that unless it was paid for in cash that the title remained in the appellant until the cash was paid. We think the only question about which there is any difficulty is, did the appellee under all the circumstances wait a reasonable length of time for appellant to make the tractor work; but this was a question of fact for the jury to determine under proper instructions. We find that appellant's first given instruction advised the jury that it was the duty of the plaintiff under the contract sued upon to give the defendant a reasonable opportunity to render any necessary adjustment or repairs to the tractor to make it comply with the guarantee as to the performance of the tractor, and unless they believe from the evidence that the plaintiff had given such opportunity then they should find for the defendant. If the jury obeyed this instruction then it necessarily found that appellee had given appellant a reasonable time within which to repair the tractor.

It is next insisted that the court erred in giving of appellee's instruction No. 1, which is as follows: "The court instructs the jury as a matter of law that defendant has filed a motion for continuance based upon the absence of one Irwin, a witness; that plaintiff to avoid continuance admits that this witness would testify as stated in said

1. The first part of the paper is devoted to the study of the
 properties of the function $f(x)$ defined by the equation

$$f(x) = \int_0^x \frac{1}{1+t^2} dt$$
 for $x \in \mathbb{R}$. It is shown that $f(x)$ is an odd function and
 that $f(x) \in C(\mathbb{R})$. Moreover, it is proved that $f(x)$ is
 strictly increasing on \mathbb{R} and that $\lim_{x \rightarrow \pm\infty} f(x) = \pm\frac{\pi}{2}$.
 2. In the second part, we consider the function $g(x)$ defined
 by the equation $g(x) = \int_0^x \frac{t}{1+t^2} dt$. It is shown that
 $g(x)$ is an even function and that $g(x) \in C(\mathbb{R})$. Moreover,
 it is proved that $g(x)$ is strictly increasing on $(0, \infty)$ and
 that $\lim_{x \rightarrow \pm\infty} g(x) = \pm\frac{\pi}{4}$.
 3. The third part of the paper is devoted to the study of the
 function $h(x)$ defined by the equation $h(x) = \int_0^x \frac{1}{1+t^4} dt$.
 It is shown that $h(x)$ is an odd function and that $h(x) \in C(\mathbb{R})$.
 Moreover, it is proved that $h(x)$ is strictly increasing on \mathbb{R} and
 that $\lim_{x \rightarrow \pm\infty} h(x) = \pm\frac{\pi}{4\sqrt{2}}$.
 4. In the fourth part, we consider the function $k(x)$ defined
 by the equation $k(x) = \int_0^x \frac{t}{1+t^4} dt$. It is shown that
 $k(x)$ is an even function and that $k(x) \in C(\mathbb{R})$. Moreover,
 it is proved that $k(x)$ is strictly increasing on $(0, \infty)$ and
 that $\lim_{x \rightarrow \pm\infty} k(x) = \pm\frac{\pi}{8\sqrt{2}}$.
 5. The fifth part of the paper is devoted to the study of the
 function $l(x)$ defined by the equation $l(x) = \int_0^x \frac{1}{1+t^6} dt$.
 It is shown that $l(x)$ is an odd function and that $l(x) \in C(\mathbb{R})$.
 Moreover, it is proved that $l(x)$ is strictly increasing on \mathbb{R} and
 that $\lim_{x \rightarrow \pm\infty} l(x) = \pm\frac{\pi}{6\sqrt{3}}$.
 6. In the sixth part, we consider the function $m(x)$ defined
 by the equation $m(x) = \int_0^x \frac{t}{1+t^6} dt$. It is shown that
 $m(x)$ is an even function and that $m(x) \in C(\mathbb{R})$. Moreover,
 it is proved that $m(x)$ is strictly increasing on $(0, \infty)$ and
 that $\lim_{x \rightarrow \pm\infty} m(x) = \pm\frac{\pi}{12\sqrt{3}}$.
 7. The seventh part of the paper is devoted to the study of the
 function $n(x)$ defined by the equation $n(x) = \int_0^x \frac{1}{1+t^8} dt$.
 It is shown that $n(x)$ is an odd function and that $n(x) \in C(\mathbb{R})$.
 Moreover, it is proved that $n(x)$ is strictly increasing on \mathbb{R} and
 that $\lim_{x \rightarrow \pm\infty} n(x) = \pm\frac{\pi}{8\sqrt{2}}$.
 8. In the eighth part, we consider the function $o(x)$ defined
 by the equation $o(x) = \int_0^x \frac{t}{1+t^8} dt$. It is shown that
 $o(x)$ is an even function and that $o(x) \in C(\mathbb{R})$. Moreover,
 it is proved that $o(x)$ is strictly increasing on $(0, \infty)$ and
 that $\lim_{x \rightarrow \pm\infty} o(x) = \pm\frac{\pi}{16\sqrt{2}}$.
 9. The ninth part of the paper is devoted to the study of the
 function $p(x)$ defined by the equation $p(x) = \int_0^x \frac{1}{1+t^{10}} dt$.
 It is shown that $p(x)$ is an odd function and that $p(x) \in C(\mathbb{R})$.
 Moreover, it is proved that $p(x)$ is strictly increasing on \mathbb{R} and
 that $\lim_{x \rightarrow \pm\infty} p(x) = \pm\frac{\pi}{10\sqrt{5}}$.
 10. In the tenth part, we consider the function $q(x)$ defined
 by the equation $q(x) = \int_0^x \frac{t}{1+t^{10}} dt$. It is shown that
 $q(x)$ is an even function and that $q(x) \in C(\mathbb{R})$. Moreover,
 it is proved that $q(x)$ is strictly increasing on $(0, \infty)$ and
 that $\lim_{x \rightarrow \pm\infty} q(x) = \pm\frac{\pi}{20\sqrt{5}}$.

affidavit but that said affidavit is not admitted as true by plaintiff but may be contradicted by defendant, and plaintiff is entitled to introduce evidence to contradict such statements if he has such testimony". The criticism made upon this instruction is that it intimated to the jury what weight should be given to the affidavit of Irwin and in support of this criticism referred to the case of Utley vs. Burns, 78 Ill., 169. The instruction in the case now under consideration omits the part that was condemned by the court in the case of Utley vs. Burns, supra, and does not make any intimation as to the weight to be given to the testimony of Irwin.

It is further urged that the court erred in refusing appellant's third and fourth instructions, which advised the jury that if the appellee failed to give the notice within the three days provided in the contract that he could not recover. These instructions ignored the question of waiver of time and the court did not err in refusing them.

Complaint is also made in appellant's reply brief, but not in the original brief, that the court erred in permitting the copy of the contract that did not have the same signatures the same as in the original contract, especially that of the agent, to be taken by the jury instead of the original, but there was no objection made at the time disclosed by this record, and no reason shown why an objection was not made to the taking of this paper by the jury. Besides, the contracts are identical except as to the arrangement of the signatures. We do not believe that this is a meritorious criticism or that appellant was prejudiced in any manner by the taking of this copy instead of the original into the jury room.

Some other matters have been suggested but not argued out by counsel and for that reason are waived.

We are of the opinion that it was a question of fact for the jury to determine whether or not this machine fulfilled the guarantee and whether or not a reasonable time was given the plaintiff to make it fulfill the guarantee, and if the machine did not work properly and was not made so to do within a reasonable time by the defendant there is no reason why the verdict of the jury in so finding should be disturbed. The judgment of the lower court is affirmed.

JULIUS ROSENBERG

Not to be reported in full.

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CHICAGO, ILL. 60607-7073

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

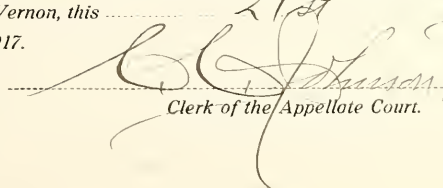
IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court

at Mt. Vernon, this

21st

day of June

A. D. 1917.


Clerk of the Appellate Court.

NOIN

3153

Opinion of the Appellate Court

AT AN APPELLATE COURT, begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March, in the year of our Lord, one thousand nine hundred and seventeen, the same being the 27th day of March, in the year of our Lord, one thousand nine hundred and seventeen.

Present:

- Hon. James C. McBride, Presiding Justice.
- Hon. Franklin H. Boggs, Justice.
- Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the ^{Eighteenth} ~~Thirteenth~~ day of ^{June} ~~April~~, A. D. 1917, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

206 I.A. 425

Maggie Barnes, Admrx.,
Appellee

ERROR TO
APPEAL FROM

vs.

Circuit COURT

No. 40
March Term, 1917
~~October Term, 1916.~~

Illinois Fuel Company,
Appellant

Randolph COUNTY

TRIAL JUDGE

HON. J. F. GILLHAM

Rec. No. 40.

In the Appellate Court

April 20.

of Illinois, Fourth District.

March Term, A. D. 1917.

Aggie Barnes, Adm'x. of)
Thomas Barnes, dec'd.,)

Appellee,)

vs.)

Illinois Fuel Company,

Appellant.)

Appeal from the Circuit Court

of Randolph County.

McGrade, J. J.

The appellee recovered a judgment against appellant for \$150.00 on account of an injury received by her husband in appellant's mine, and death resulting therefrom.

It appears from the record in the case that on October 20, 1915, the deceased Thomas Barnes was engaged at work in room number 23 off the 5th West entry of defendant's mine, and that there was a dangerous place in the roof of the room; that a piece of slate or bastard rock was loose, and that appellant failed to examine the room and mark the same as dangerous when it should have done so; and that appellant permitted the deceased to enter this room for work without in any manner advising him of the dangerous condition of the room. The deceased, while at work in this room, under the directions of appellant, was injured by a fall of slate or rock from the roof of the room, which was not marked as dangerous. The piece of rock or slate that fell upon the deceased was about 5 by 5 feet and 6 inches thick in places. The evidence tends to show that when the clod fell upon him that it

broke his left leg just below the thigh; his ear was torn; the side of his face bruised; and his chest more or less bruised; and, from what some of the witnesses say, he was bruised all over; that in from 5 to 7 days he contracted pneumonia, and recovered from that in about 14 days, and after the expiration of three months the splints were taken off his limb and let him up, and thereafter by the aid of other persons he could walk a few steps; that before he died he could take a chair and walk a little with it; he never got so he could use his limb; the heart was affected by the pneumonia and the deceased was in a very low state of vitality from the time of his injury until his death; that he was not able to sit up or move about without help; and that he died suddenly and while sitting on the edge of his cot. A few days before his death the doctor examined him and took an X-ray of his limb, and his physical condition at that time was below par. The physician states that he did not at that time examine his heart but says that while he was waiting on him his heart, from the pneumonia, was bad, and that the pneumonia was caused either by exposure in wearing him after the injury, or the injury. It further appears that prior to his injury he was a stout, able-bodied man, and capable of doing such work.

The negligence of appellant is not denied, but it is sought to reverse this case for two reasons; first, that the appellant was not liable because it was, as is provided by Statute, operating under the Compensation Act; and second, that the death of deceased was not caused by the injury received from the falling rock.

The first objection urged, that the appellant was operating under the Compensation Act, is not well taken. It

THE UNITED STATES OF AMERICA
DO hereby certify that
the following is a true and correct copy
of the original as the same appears
on the records of the
Department of the Interior
at Washington, D. C.
this 1st day of January, 1901.
By the Secretary of the Interior,
J. M. McKim,
Secretary.

appears from the evidence that prior to the time of the injury, and on the first day of July, 1912, the appellant filed with the Industrial Board of the State of Illinois, a notice by which the appellant elected not to accept the provisions of the Compensation Act of this State, and a certified copy of such notice was produced upon the trial. It is insisted, however, by counsel for appellant that because the evidence of appellee failed to show that notice of such election was not posted in the mine, or notice thereof given to the deceased, that the plaintiff has failed to make a case, and for that reason the case should have been taken from the consideration of the jury. This question has never, so far as we know, been passed upon by the Supreme Court of this State, but it has at several times been decided by this court. In the case of Hughes vs. Coal Company 197 App. 617 this question was carefully considered and determined against the contention of the appellant, and in two later cases decided by this court this decision has been followed, and we do not regard it as an open question in this court. It seems to us that it would be a mockery of justice to permit the appellant to claim exemption from statutory or common law liability, and seek to shield itself from liability because of a statute which the appellant has stated in plain terms it has elected not to come under, and also has taken advantages of the present trial of defenses that it was not entitled to if operating under the Compensation Act, and if it were, in fact, operating its mine under the Compensation Act, it could easily have said so by a plea to the jurisdiction of the circuit court when the appellee sought to recover in this form of action. We are inclined to adhere to the former doctrine announced by this court upon this

question, and do not regard the objection as well taken.

It is next urged by appellant that the appellee should not recover in this case for the death of Thomas Barnes because such injury was not the proximate cause of the death. The appellant does not contend that it was not negligent in this matter, but says that the plaintiff has failed to show that the death of Thomas Barnes was occasioned by this injury. The question of the proximate cause of an injury is one largely to be determined by the jury, and unless the evidence is such that all reasonable persons would concur in saying that it was not the result of the injury, then it remained a question of fact and did not become a question of law. Casey Adm'r. vs. Chicago Railway Co. et al. 184 App.440. The Piazza vs. Coal Company, 262 Ill. 36. It appears from the evidence in this case that prior to the injury the deceased was a healthy man and capable of working every day, and that at the time he was injured a large body of rock or coal fell upon him; that his breast was bruised; his ear injured; his leg broken above the thigh; and, as some of the witnesses put it, he was "bruised all over"; that immediately after he was taken to his home, after the injury, he was washed and dressed and put to bed; his limb was set and he seemed to be suffering considerable pain; that in about five days thereafter he was attacked with pneumonia which lasted for about two weeks, and left him with a weak heart; that after the expiration of about three months the splints were removed from the limb, but he was never able to get about without assistance; he never became strong and a few days before his death he was examined by the doctor who said that his physical condition was below par, and that he was weak and in a

very low state of vitality; that shortly after this examination, and while he was sitting on the cot, died. "Then he died he seems to suddenly hurt in chest, and died quickly; he seemed to be no different that day."

It appears from the evidence that his heart became weak on account of the pneumonia, and that the pneumonia followed as a result of the injury, and the deceased having died so suddenly, it seems to us that the jury would be warranted in finding that the death resulted from a weakened heart resulting from pneumonia produced by the injury that the deceased received at appellant's mine, and that there was an unbroken chain of conditions extending from the death back to the injury making the injury the efficient cause of the death; at least, we are not able to say that there was manifest error in the jury so finding. It does not appear from this evidence that there was any intervening cause between the injury and the death that could not reasonably have been traced back to and connected with the original or efficient cause without which this death would not in all reasonable probabilities have happened as it did. "The proximate cause of an injury is that act or omission which it immediately causes, and without which the injury would not have happened, notwithstanding other conditions or omissions concurred therewith..... In the City of Joliet vs. Knufeldt, 144 Ill 403, we deduced from the authorities the general doctrine that it was not a defense to an action for an injury occurring by reason of the negligent act of the defendant; that the negligence of a third person, or an inevitable accident, or an inanimate thing, contributed to cause the injury to the plaintiff if the negligence of the defendant was an efficient cause and without which the injury would not have

occurred." Miller vs. Kelly Coal Company, 239 Ill. 626.

"The rule of common law is that if an injury results from the negligent act of another, it is no defense that the negligence of a third person, or an inevitable accident, or some inanimate thing, also contributed to cause the injury if the negligence charged against the wrongdoer was an efficient cause, and without which the injury would not have occurred." Brunworth vs. Jones Coal Company, 280 Ill. 202.

Counsel for appellant quotes and argues extensively from the case of Lauth vs. Traction Company, 244 Ill. 260, but we do not regard this case as in any manner decisive of the question now under consideration. In that case the plaintiff sought to recover because of a strangulated hernia, and a physician was put upon the stand and was allowed to testify that "the strangulation prevents circulation and causes the destruction of that portion of the bowel beyond where the strangulation occurs; mortification will come from want of nourishment, and death will result"; but the plaintiff also testified that his hernia had become strangulated upon a number of occasions; that he had observed the treatment by doctors and had followed the methods used by them and reduced the hernia without any assistance, medical or otherwise; and there it was sought to recover for the possible death of the plaintiff, which the Court said could not be done, because it did not appear that the consequences relied upon were reasonably certain to result, and that they were purely speculative. In the case under consideration the jury have found that the consequences have resulted, and therefore they are not speculative. Counsel also argues from the Lauth case that before the appellant

would be liable for the death of Thomas Barnes that it should reasonably have foreseen and expected this sequence. We do not understand this to be the correct rule. While it may be necessary that the circumstances should be such that the defendant should have reasonably foreseen that some injury might result, but not the particular injury, nor the extent of the injury. "In order to make a negligent act the proximate cause of an injury it is not necessary that the particular injury and the particular manner of its occurrence could reasonably have been foreseen. (City of Dixon vs. Cott, 181 Ill. 116) If the consequences follow in an unbroken sequence from the wrong to the injury without an intervening efficient cause, it is sufficient if at the time of the negligence the wrong-doer might, by the exercise of ordinary care, have foreseen that some injury might result from his negligence." Lord vs. Pines Company, 237 Ill. 463.

We are of the opinion, as above stated, that the jury were warranted in finding that the consequences resulting in the death of Barnes followed in an unbroken sequence from the wrong to the injury, and without any intervening efficient cause to aggravate or change the cause, and the judgment of the lower court is affirmed.

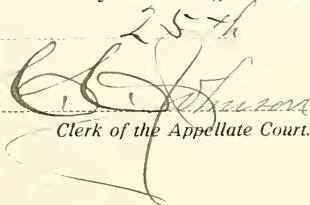
Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court

at Mt. Vernon, this 25th day of April, 1917.

A. D. 1917.


Clerk of the Appellate Court.

3137

Opinion of the Appellate Court

AT AN APPELLATE COURT, begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March, in the year of our Lord, one thousand nine hundred and seventeen, the same being the 27th day of March, in the year of our Lord, one thousand nine hundred and seventeen.

Present:

Hon. James C. McBride, Presiding Justice.

Hon. Franklin H. Boggs, Justice.

Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the ^{Eighteenth} ~~Thirteenth~~ day of ^{June} ~~April~~, A. D. 1917, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

206 I.A. 452

Charles H. Greenwood et al,
Plaintiffs in Error

ERROR TO
APPEAL FROM

vs.

Circuit COURT

No. 6
March Term, 1917
~~October Term, 1916.~~

Ben L. Maxey et al,
Defendants in Error

Clay COUNTY

TRIAL JUDGE

HON. J. C. MC BRIDE



March Term, 1917.

Maggie Bier Wagner, et al,	}	
Plaintiffs in Error		
v.		Error to Clay.
Ben L. Maxey, et al,		
Defendants in Error	}	

Opinion by Higbee, J.

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Ben L. Maxey is the owner and publisher of the "Southern Illinois Journal", a newspaper published in the city of Alora, Clay county. On January 9, 1914, he announced through the columns of his paper that he would institute and conduct a contest and give certain prizes to the six persons securing within a specified period the greatest number of subscriptions to the paper, and that all contestants not receiving a prize were to receive a certain commission on the subscriptions obtained. The contest was conducted by Burgess, Johnson & Company, who sent one W. A. Graves to Alora to act as "Contest Manager" while the same was being conducted. At the close of the contest Charles Austen was declared to have obtained the most subscriptions and was awarded and given the first prize, a Ford automobile.

At the September term, 1914 of the circuit court of Clay county three of the contestants, Lee Burr, Maggie Bier Wagner and Charles W. Greenwood, filed this bill against Ben L. Maxey and Charles Austen, defendants in error and the other contestants. Afterwards the bill was dismissed as to Lee Burr

at her request and she was made a defendant. The bill charges fraud and collusion on the part of and between Maxey and Austen whereby Austen was awarded the automobile, and alleged that Greenwood secured the most subscriptions and was in fact entitled to the same; that plaintiff in error, Maggie Lier Wagner was entitled to one of the prizes and that certain persons, made parties defendant, were entitled to the other prizes. It sets forth in detail the acts constituting the alleged fraud and collusion, and charges that the judges who counted the final votes were deceived by the defendants in error. The prayer for relief contained in the bill is "that the said pretended count and award so rendered against the said complainants may be set aside and vacated and that a new and proper award may be made in said cause, and that the respective prizes may be awarded to those persons lawfully entitled thereto, and that the cash payments offered in said contest may be decreed to be paid to those entitled thereto, and that the said Ben S. Maxey may be ordered to deliver to the said contestants the prizes offered in said contest by the Southern Illinois Journal, and in the event of his failure so to do, that he be decreed to pay to the contestants and each of them the value of the said prizes in money, or that the defendants Ben S. Maxey and Charles Austen be decreed to pay to complainants and to each of them the value of the prize to which each is entitled, and that the court will grant unto complainants such other and further relief etc." On the hearing the bill was dismissed for want of equity and complainants below have sued out a writ of error in this court.

The entire argument of plaintiff in error is devoted to a discussion of the sufficiency of the proof to establish

the fraud charged in the bill, but in our view of the case this question cannot be considered. The proof discloses that all the prizes had been delivered and that Austin had sold the automobile before the trial, so that the most that could be obtained in this cause would be a money judgment. This is practically conceded by counsel for plaintiff in error who say in their argument that Hattie Pier Wagner "should have had a decree in her favor for at least the value of one of those watches, which purported to be worth about \$40", and "Greenwood should have a decree in his favor for at least the sum of \$870 which was that year the value of his automobile." There is no allegation in the bill, no proof was offered and no claim is made, of the insolvency of defendants in error. Under the facts as above detailed the question at once arises whether plaintiffs in error have selected the right form of action to obtain the relief sought by them. Plaintiffs in error ^{they} apparently rely upon the theory that when Maxey advertised the contest and they became contestants under the terms advertised, a contract was created between them and that this is not an action for damages but a bill seeking the performance of the contract. It may be said in answer to this that neither the bill nor the proof makes out a case for specific performance and neither shows ground for such relief. From all that appears from the bill or the proof, plaintiffs in error can be fully compensated by damages for any wrong claimed to have been sustained by them and this satisfaction is all that is insisted upon by them in their argument. But courts of equity do not sit for the purpose of entertaining bills, the only object of which is to secure damages, and equity

will not decree the specific performance of a contract which relates to personality where compensation in damages furnishes a complete and satisfactory remedy. *Varren v. Legg*, 206 Ill.326; *Anderson v. Olson*, 128 id.562; *Elty v. Jacobs* 171 id.624; *Lancaster v. Roberts*, 124 id.213.

It would appear that the judgment for damages in this suit would be of no more avail to plaintiffs in error than such a judgment at law and that their remedy is therefore in law and not in equity. As stated in *Richards v. L. & L. Ry.Co.* 25 Ill.App.344, "The rule has been so often repeated as to have become a recognized legal maxim that a party can have no standing in a court of equity who has a plain and adequate remedy at law". As plaintiffs in error had an adequate remedy at law for the relief sought by them they could have no standing in a court of equity and therefore the chancellor did not err in dismissing the bill for want of equity and the decree will be affirmed.

Affirmed.

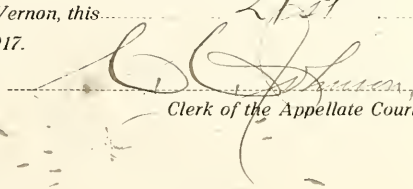
Mr. Justice McBride having tried this case as chancellor in the court below, took no part upon the hearing here.

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court

at Mt. Vernon, this 21st day of June,
A. D. 1917.


Clerk of the Appellate Court.

NOINI

3157

Opinion of the Appellate Court

AT AN APPELLATE COURT, begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March, in the year of our Lord, one thousand nine hundred and seventeen, the same being the 27th day of March, in the year of our Lord, one thousand nine hundred and seventeen.

Present:

- Hon. James C. McBride, Presiding Justice.
- Hon. Franklin H. Boggs, Justice.
- Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the ~~Thirteenth~~ ^{Eighteenth} day of ~~April~~ ^{June}, A. D. 1917, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

Chicago Warehouse & Silo Fixture Company,

Plaintiff in Error

vs.

No. 12
March Term, 1917.
~~October Term, 1916~~

Highland Planing Mill & Lumber Co., et al,

Defendants in Error

206 I.A. 458

ERROR TO
APPEAL FROM

Circuit COURT

Madison COUNTY

TRIAL JUDGE

HON. J. F. GILLHAM



March Term, 1917.

Chicago Warehouse & Bilo Fixture
Company,

Plaintiff in Error

v.

Highland Planing Mill & Lumber Company,

et al,

Defendants in Error

Error to Madison.

Opinion by Higbee, J.

---oOo---

This is an action of assumpsit commenced by Chicago Warehouse & Bilo Fixture Company, to the October Term, 1916 of the Madison county circuit court, against Highland Planing Mill and Lumber Company and Hug Lumber & Construction Company.

The declaration consists of the common counts with which was filed an affidavit of merits. The defendants each filed a plea of the general issue supported by an affidavit reciting that the suit and each count of the declaration is for goods claimed by plaintiff to have been sold to defendant and delivered to it pursuant to alleged contract, whereas, in fact no such goods were ever sold or delivered by plaintiff to defendant, or received by defendant, but that said contract was rightfully and lawfully rescinded by defendant. A motion to strike defendants' pleas and affidavits was denied by the court. A jury was waived and trial had before the court upon a written stipulation of facts. It appears from the stipulation filed, that the defendant in error, Highland Planing Mill & Lumber Company,

placed a written order with plaintiff in error, dated December 7, 1915, for five sets of silo fixtures, . . . care at Chicago, Illinois, to be shipped about August 1, 1916 to it at Highland, Illinois for a price of \$215.25. By the terms of the contract defendant in error had the privilege of changing the size of the fixtures therein mentioned at any time prior to shipping date and the contract or order also contained the following provision: "This written order constitutes the sole agreement between the parties hereto, and cannot be countermanded or altered except by mutual consent in writing."

Plaintiff in error acknowledged receipt of the order by letter dated December 15, 1915. On July 12, 1916 defendant in error, Hug Lumber & Construction Company, successor to Highland Planing Mill & Lumber Company, wrote plaintiff in error requesting that the order be cancelled. By letter dated July 13, 1916, plaintiff in error refused to cancel the order, and on July 17, this defendant in error again wrote asking that the order be cancelled, which plaintiff in error again refused to do by letter dated July 21. On or about August 1, the goods were shipped and reached the station at Highland. Defendant in error refused to accept them and so notified plaintiff in error by letter dated August 3, 1916. Other letters afterwards passed between the parties but the matter was not adjusted and this suit resulted. Judgment was rendered against plaintiff below for costs which it seeks to reverse by this writ of error. Various propositions of law were submitted to the court on the trial. All propositions presented by defendants in error were held by the court to be the law, and all but three of plaintiff in error's were refused.

The court held in substance that while by the terms

of the contract neither party had the right to cancel or alter it without the consent of the other, yet the attempted revocation by defendants in error prevented plaintiff in error from making a valid delivery of the goods to the defendants in error by delivering the same to a carrier in Chicago; that therefore plaintiff in error could not recover the full contract price under the common counts, but that its remedy would be by a special count for damages for a breach of the contract. The holding of the court is fully indicated by proposition No. 5 which was as follows: "The court holds the law to be that the provision in the order in evidence in this case that the same 'cannot be countermanded or altered except by mutual consent in writing', did not bar the defendant, Highland Planing Mill & Lumber Company or its successor, Hug Lumber & Construction Company, from thereafter repudiating the said order or contract; that the letters of the defendant, Hug Lumber & Construction Company of date July 12 and July 17, 1916, constituted such repudiation and that thereafter and while such repudiation was unrevoked, the only remedy of the plaintiff, if any, was by an action for a breach of the contract of purchase and sale." After judgment of the court was announced plaintiff in error asked leave to file such special count, which was denied.

Counsel for plaintiff in error contends the trial court erred in denying the motion to strike defendants' pleas and affidavits from the files, in refusing to hold as the law each of the propositions of law submitted by plaintiff in error, in holding as the law each of the propositions presented by defendants in error, in finding the issues for defendants in error and in refusing to permit plaintiff in

error to amend the declaration by adding on additional count.

The principal question to be determined is whether there can be a recovery of the contract price had in this case under the common counts, taking into consideration the attempted rescission of the contract. An examination of the two letters written by Rug Lumber & Construction Company to plaintiff in error, discloses that there was no direct and positive rescission of the contract of sale or countermanding of the order. The first letter, after stating that said company had fixtures on hand from last season, which was thought to be all they would be able to dispose of, proceeded "would kindly ask that you will cancel our order for the five sets of fixtures you have on file for future delivery." It is to be borne in mind that the order blank contained the agreement that it could not be countermanded or altered, except by mutual consent of the parties thereto in writing. The above letter appears to recognize the binding force of this provision of the order and the right of plaintiff in error to grant the request contained in the letter to cancel the order or not as it might see fit. That this was the view of the company on behalf of which the letter was written, is further shown by the fact that when plaintiff in error refused to cancel the order as requested, said company sent a further communication stating that they had two sets of fixtures still on hand, it found extremely difficult to dispose of and again asking said company, in view of that fact "to kindly cancel our order given you sometime ago". The language of these letters does not appear to us to amount to a countermand or rescission of the order, but simply to an appeal to or request of plaintiff in error to permit said company to abandon its order in view of the

fact that it had silo fixtures on hand from the previous year, which it was unable to sell. This consent was never given by plaintiff in error, which insisted upon standing by the terms of the contract and therefore the contract was never legally rescinded.

It is true as claimed by defendants in error that there is a line of authorities in this state which hold that if a buyer refuses to accept goods according to his contract, the seller cannot recover the purchase price as such, upon the common counts but must recover if at all upon counts alleging damages for a breach of the contract in refusing to accept the goods when tendered, but these same authorities also hold that when the contract has been fully performed and nothing remains to be done but the payment of the money, the common counts are applicable. *Brand v. Henderson*, 107 Ill. 141; *Troop v. Sherwood*, 4 Ill. 92; *Burnham v. Roberts*, 70 Ill. 126. The opinions in the cases relied upon by defendants in error, seem to be based on the fact that there was no delivery of the articles sold to the purchaser, and it is evident that where there is no delivery, there is no performance of the contract by the seller. But in this case there having been no rescission of the contract as we have above held, then by the terms thereof, a delivery to the carrier in Chicago was a delivery to the company giving the order or its successor. *Carthage v. Duvall*, 202 Ill. 234; *Earl Sigbee v. Summit Lumber Co.* 125 Ill. App. 391. Defendants in error cite various portions of the "Uniform Sales Act" as sustaining the view of the law taken by the trial court, as indicated by the propositions of law submitted by them and held by the court to be correct statements of the law, as appli-

cable to this case. That act, however, was not intended to supplant a written contract between the parties to a sale nor to abrogate its terms, and notwithstanding it, parties have the right to make such terms by their contracts concerning the delivery of goods, as they may desire. The contract in question under consideration, here, expressly, provided that it could not be countermanded except by mutual consent in writing. This consent was not given and the Uniform Sales Act does not, under such circumstances, surmount it. There was a delivery of the goods in this case, and nothing remained to be done to complete the contract on the part of the seller and nothing remained to be done on the part of the purchaser, but the payment of the money, ⁴⁸in our opinion a recovery of the purchase price could properly be had on the common counts and the trial court erred in holding, as the law, that a recovery could not be had under such counts.

We are also of opinion that had a special count been necessary to entitle plaintiff in error to recover, that the court should have granted leave to it to file such special count, even though it was not offered until after the court had announced the finding of the issues in favor of defendants in error. For the reasons above given the judgment of the court below will be reversed and the cause remanded.

Reversed and remanded.

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

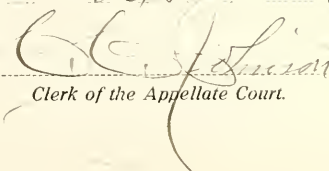
IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court

at Mt. Vernon, this.....

21st

day of April, 1917

A. D. 1917.


Clerk of the Appellate Court.

NOIN

3160

Opinion of the Appellate Court

AT AN APPELLATE COURT, begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March, in the year of our Lord, one thousand nine hundred and seventeen, the same being the 27th day of March, in the year of our Lord, one thousand nine hundred and seventeen.

Present:

Hon. James C. McBride, Presiding Justice.

Hon. Franklin H. Boggs, Justice.

Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the ^{Eighteenth} ~~Thirteenth~~ day of ^{June} ~~April~~, A. D. 1917, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

206 I.A. 460

Stephen D. Sexton,

Pltf. in Error

ERROR TO

~~X APPEAL FROM~~

vs.

Circuit

COURT

No. 17

March Term, 1917
~~October Term, 1916.~~

Michael Harrold,

Deft. in Error

St. Clair

COUNTY

TRIAL JUDGE

HON.

LOUIS BERNREUTER



March Term, 1917.

Stephen D. Sexton,)	
Plaintiff in Error)	
v.)	Error to Ct. Clair.
Michael Harrold,)	
Defendant in Error)	

Opinion by Justice, J.

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This was an action of assumpsit brought to the April Term, 1916 of the circuit court of St. Clair county by Stephen D. Sexton, to recover from Michael Harrold, the sum of \$7500 as commissions claimed to be due him for the sale of 200 shares of stock owned by the latter.

The declaration consisted of one special count and the common counts consolidated. The special count alleged in substance that on the 1st day of January, 1916, defendant owned 200 shares of the capital stock of the Hammer Loe Company, an Illinois corporation, and being desirous of selling same procured plaintiff to make a sale thereof ~~XXXX~~ for him and promised to pay plaintiff whatever his services in that behalf were reasonably worth; that on February 1, 1916, plaintiff sold such stock to one Frank M. German for \$60,000; that his services in that respect were reasonably worth \$7500 and that defendant was indebted to him in that amount. The case was tried before a jury and resulted in a verdict for the defendant. After overruling a motion for a new trial,

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the court entered judgment against plaintiff for costs, to reverse which this writ of error was prosecuted by him.

Counsel for plaintiff in error urges that the verdict is contrary to the evidence. It appears from the proofs that the capital stock of the Banner Ice Company consisted of 400 shares of the par value of \$100 each, owned as follows: defendant in error 300 shares, Dan Sullivan 140 shares, Frank E. Bowman 50 shares and plaintiff in error 10 shares. Considerable friction had arisen between defendant in error and Dan Sullivan, and plaintiff in error in an endeavor to bring about an adjustment of the trouble, wrote a letter on January 10, 1916 outlining a plan of settlement to defendant in error and Sullivan. Defendant in error made no reply to this letter, but Sullivan replied offering to buy defendant in error's stock for \$300 per share or to sell his own for that price. Nothing came of this effort on the part of plaintiff in error and he made no further attempt to settle the trouble. Plaintiff in error who was the only witness in his behalf, testified that on January 18 or 19, 1916, defendant in error came to his office and in the presence of two of his employes engaged him to sell his stock; that in pursuance of such employment he arranged for a meeting of defendant in error and Frank E. Bowman, at which the sale was consummated, and that at the same time he sold his stock to Bowman at the same price. This employment was denied by defendant in error, who claimed that whatever plaintiff in error did in the matter he did of his own motion with a desire to settle the trouble among the stockholders. Neither of plaintiff in error's two employes was offered as a witness. Defendant in error produced as a witness, Frank E. Bowman, who testified that plain-

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tiff in error told him about the matter and said, "I tell you, I might get Mike (Mr. Harrold) down to the bank, and perhaps you can do something with him,--talk with him"; that plaintiff in error got Harrold to act as witness at the bank where the sale was made. The firm of Norton & Sons, composed of plaintiff in error and his two sons, had been collecting rents and transacting other business for defendant in error, his wife and his brother. In February 22, 1916, defendant in error placed this business in the hands of another firm, and on the same day plaintiff in error sent him a statement of the amount sued for. Defendant in error testified this was the first time he learned plaintiff in error claimed anything for the sale of the stock.

It was a question of fact to be determined by the jury whether plaintiff in error was employed by defendant in error to sell his stock. The burden was upon plaintiff in error to prove such employment by a preponderance of the evidence. Plaintiff in error testified he was so employed, which was denied by defendant in error. It can hardly be said the evidence of the witness Bowman corroborated plaintiff in error. Under a line of decisions too familiar to need citation this court will not disturb the verdict of the jury, unless it is manifestly against the weight of the evidence. Such is far from the case here.

It is further contended by plaintiff in error that it was error for the trial court to admit in evidence plaintiff in error's letter to Harrold and Sullivan and Sullivan's reply. These letters tended to show the relations existing between the parties to this suit, and in view of defendant in error's contention that plaintiff in error's action was

purely voluntary, were properly admitted.

The trial court gave seven instructions in behalf of defendant in error, five of them being on the question of preponderance of evidence. All of these instructions stated the law correctly, but counsel for plaintiff in error insists it was error for the court to give so many instructions on this one point. While it was not good practice to give so many instructions on this one question, yet it was not material error to do so. The verdict is supported by the evidence and no material error appears on the record. The judgment will therefore be affirmed.

Affirmed.

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

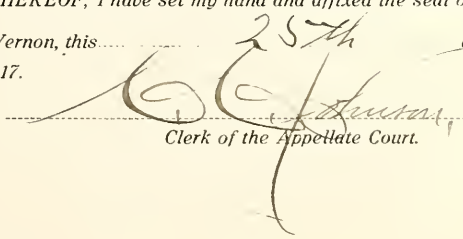
IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court

at Mt. Vernon, this.....

25th

day of April,

A. D. 1917.


Clerk of the Appellate Court.

NOIN

3161

Opinion of the Appellate Court

AT AN APPELLATE COURT, begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March, in the year of our Lord, one thousand nine hundred and seventeen, the same being the 27th day of March, in the year of our Lord, one thousand nine hundred and seventeen.

Present:
Hon. James C. McBride, Presiding Justice.
Hon. Franklin H. Boggs, Justice.
Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the ^{Eighteenth} ~~Thirteenth~~ day of ^{June} ~~April~~, A. D. 1917, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

206 I.A. 461

Harriet Gilmore,

Appellee

ERROR TO
APPEAL FROM

vs.

No. 20
March Term, 1917.
~~October Term, 1916.~~

Circuit COURT

Sylvester Killion, et al,

Appellants

Marion COUNTY

TRIAL JUDGE

HON. THOMAS M. JETT



March Term, 1917.

Harriet Gilmore,

Appellee

v.

Appeal from Section.

Wyldeston Million, et al,

Appellants

Opinion by Mr. Bee, J.

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On March 22, 1915, one Charles Taylor shot and killed Harold Gilmore, 32 years of age in the saloon of Wyldeston Million, one of the appellants, in the city of Centralia, Illinois, at the same time wounding a companion of Gilmore's who was sitting near him. The circumstances surrounding and leading up to the shooting were no provocation whatever. Taylor was convicted and sentenced to the penitentiary, but was present in court and testified in this case. His suit was brought by Harriet Gilmore, mother of Harold Gilmore, against appellants and several other persons under Section 9 of the Breachmen Act. The declaration in the case consisted of two counts, joining the owners of the buildings with the keepers of the saloons and alleged that said Harold Gilmore had, prior to his death, contributed to the support of the plaintiff, in other, out of the wages earned by him; that defendants were engaged in the retail liquor business as keepers of bars where in the city of Centralia, Illinois; that they gave to one Charles Taylor intoxicating liquor, causing his intoxication in whole or in part and while he was so intoxicated, and by reason there-

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of, he shot and killed the said Hannie Gilmore. The first count charged that the plaintiff was injured in her property and means of support and the second that she was injured in her means of support. At the close of appellee's evidence the court instructed the jury to find all the defendants not guilty, except Sylvester Wilcox, John Listello, F.J. White, Walter Scott and Thomas Hallaway, who are the appellants here. On the trial the jury returned a verdict for \$660 for which the court rendered judgment, after overruling a motion for a new trial. The case comes before this court on an appeal by the defendants below, from that judgment.

The evidence shows that appellee resides in the state of Mississippi and that she is possessed of 70 acres of land which she declares is not sufficient to support herself and husband, who is not able to work. Counsel for appellants contend that in order for appellee to recover in this case, her son being an adult, it was incumbent upon her to prove by a preponderance of the evidence that she was a resident of the state of Illinois, and also a poor person, so that she would come within the provisions of the **Kauper Act** of the state of Illinois, and that her son was financially able to support and maintain her; that she must show that she had a legal right to be supported by her son; that voluntary contributions to her support by her son would not be sufficient to entitle her to recover under the statute. Our attention is called by appellants to *Jury v. Ogden*, 56 Ill.App.100, which was a suit under this statute by a daughter for damages to her person and means of support occasioned by the intoxication of her father, where it was held that the means of support referred to in the statute

are such as the person intoxicated would be legally bound to furnish, and that the daughter could not recover, but that case does not appear to have been cited or followed in cases of this nature, so far as we have been able to discover. In the case of Danley v. Hibbard 220 Ill. 20, a suit brought by Lottie Hibbard, appellee, to recover damages under this statute caused by the selling and giving of intoxicating liquors to her adult son resulting in his habitual intoxication and pauperism and imposing upon appellee the statutory duty of supporting him, in the performance of which duty she expended her own means and property, our supreme court, in affirming a judgment for \$10000, in favor of appellee said, "It is conceded that the statute is broad enough to include a child and parent but the argument is that the right of action is only in favor of the one who, under the facts and circumstances as they exist at the time, has a legal right in actual enjoyment, which has been injured in consequence of the intoxication. The proposition as stated is, that this action will not lie because the son, Robert A. Hibbard, had no right to bring a suit to enforce the enjoyment of his right to support by his mother. If the argument were sound it could not be applied to this suit, which was brought by the mother for damages resulting from the performance of her duty. She, and not the son, was the ^{person} injured, and the injury resulted from imposing upon her the performance of a duty which otherwise would not have existed. If she performed her statutory duty, the question whether her son would have a right of action against her if she had failed to perform it is immaterial. Even reversing the situation, a wife living with her husband, or a child, cannot bring a suit

against the husband or father for a failure to furnish proper support, but it would not be thought that such wife or child could not maintain an action under this statute".

The case of *Wells v. Miller*, 127 Ill.41, was a suit by a woman to recover damages for loss of support caused by the sale of liquor in violation of law to her brother. The opinion of the supreme court in this case contains the following language, "The statute gives a cause of action to any person who shall be injured in person, property or means of support, either by an intoxicated person or in consequence of the intoxication of any person, against the person causing such intoxication. There seems to be no room for construction. It is not necessary that the person injured should sustain any business or personal relation to the intoxicated person. Any person sustaining an injury of the kind mentioned, whether directly by the act of an intoxicated person or indirectly in consequence of his intoxication may maintain the action. (*Wing v. Holm*, 111 Ill.146) The complaince was, in fact, supported by her brother. She was dependant upon him and he was legally liable for her support. She was wholly without means and unable to earn a livelihood. Under the circumstances disclosed by the record, the statute (Rev.Stat.Chap.127) imposed upon her brother the duty of supporting her. (*People v. Hill* 183 Ill.186; *Carley v. Howard*, 222 Ill.83) Whether it was a legal right which appellant could have enforced against her brother or not, it was a legal liability which the law imposed upon him and provided means for enforcing, of which she was receiving the benefit, and which she was deprived of in consequence of his intoxication. The statute gives her a cause of action for such deprivation". Subsequently in *Wool v. Neillingenstein*, 244 Ill.231, the same court held, "The fact the wife may

have means of her own or an income from a source other than her husband, will not affect her right to recover damages under the dramshop act for an injury to her means of support on account of the death of her husband. She still has the right to recover for the loss of the support she was entitled to receive from her husband", citing *McCabe v. McCleley*, 77 Ill. 186 and *McManon v. Enkey*, 132 Ill. 686. From these authorities it is plain that the doctrine laid down in *Jury v. Quinn* and insisted upon by appellants is not the rule in this state and that appellee is entitled to maintain this action.

What is above said disposes of appellants' assignment of error based upon the trial court's refusal to give their peremptory instructions and their instructions Nos. 1, 3, 4 and 5 which followed the rule laid down in the case of *Jury v. Quinn*. The giving of appellee's instruction No. 1, which was substantially in the language of the statute, is assigned as error, for the reason it authorizes the awarding of exemplary damages without giving to the jury any rule or guide for fixing such damages. Appellants' objections to this instruction are well founded but inasmuch as the sum allowed by the jury is small and is so clearly within the actual damages sustained by appellee as shown by the evidence, it would seem that exemplary damages were not allowed, and therefore the instruction was not prejudicial to the rights of appellants, and, under the circumstances, the giving of the same did not constitute reversible error. Appellee's instruction No. 1 is likewise subject to the criticism made by appellants that it does not explicitly require the jury to base the verdict on a preponderance of

the evidence. It does however, require a verdict from the evidence, and other instructions given require all findings to be from a preponderance of the evidence and it is not necessary that this requirement be repeated in every instruction. The instructions read in Section 10, are a correct statement of the law, but all the elements contained therein were fully covered by the instructions given on their behalf. The instructions given were considered as a whole fairly and accurately stated the law. Hence, to this end, under the theory of the law we have stated.

The proof is abundantly sufficient to support the finding of the jury that "before the killing, long from time to time for the past two or three years, he killed, his mother; that he was intoxicated at the time of the shooting; that he obtained liquor at the time of the shooting was the result of the intoxication. The case appears to have been decided correctly on the law and no reversible error is shown by the record, the judgment will be affirmed.

affirmed.

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

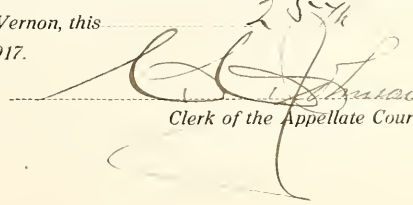
IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court

at Mt. Vernon, this

25th

day of June, 1917

A. D. 1917.


Clerk of the Appellate Court.

NOIN

3162

Opinion of the Appellate Court

AT AN APPELLATE COURT, begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March, in the year of our Lord, one thousand nine hundred and seventeen, the same being the 27th day of March, in the year of our Lord, one thousand nine hundred and seventeen.

Present:

Hon. James C. McBride, Presiding Justice.

Hon. Franklin H. Boggs, Justice.

Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the ^{Eighteenth} ~~Thirteenth~~ day of ^{June} ~~April~~, A. D. 1917, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

George Lirkovich,

Appellee

vs.

No. 23
March Term, 1917
~~October Term, 1916~~

Lazo Maravich,

Appellant

206 I.A. 463

~~ERROR TO~~
APPEAL FROM

City

COURT

East St. Louis

COUNTY

TRIAL JUDGE

HON.

H. L. BROWNING



George Mirkovich,)
Appellee)
v.) Appeal from City Court East St. Louis.
Lazo Karavich,)
Appellant)

Opinion by Higbee, J.

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On December 8, 1915, appellant Lazo Karavich, sold to George Mirkovich, for a consideration of \$1300 his saloon business at 2101 Kansas Avenue in the city of East St. Louis, Illinois and in the written contract of sale agreed not to engage in the saloon business within five blocks of 2101 Kansas Avenue for three years.

This is an action in assumpsit by appellee against appellant to recover damages for a breach of that part of the contract by which appellant agreed that he would not re-engage in the saloon business within the limits and time above mentioned. There was a verdict and judgment for plaintiff for \$1300, from which the defendant prosecutes this appeal. Both parties are foreigners and the saloon business sold was located in a neighborhood frequented by persons of their nationality. About a month after the sale a saloon was opened at 1916 Division Avenue, ostensibly by appellant's brother, with appellant in charge. The evidence shows this place to be within five blocks of 2101 Kansas Avenue, and the jury was amply warranted in believing that the saloon was in reality owned by appellant. He claimed to

have bought out his brother before the trial, and it was shown that at the time of the trial he was again in the saloon business at 2101 Kansas Avenue.

It is urged by counsel for appellant that there is no basis in the evidence for the amount of the verdict returned unless speculative profits can be made the basis of a verdict in a case like this. The proof shows a most flagrant breach of the contract, and the only question is as to the amount of the damages. The object of the contract was to secure the saloon business at 2101 Kansas Avenue against a loss of business and consequent profit which might result from a competitive business conducted by appellant within five blocks of that place. For a violation of this covenant, appellee may recover for loss of profits and diminution in the value of the business. *Bauwens v. Goethals*, 107 Ill.App. 563. These damages were difficult of proof under the circumstances of this particular case and the proof of damages is not entirely satisfactory as to amount. It appears, however, appellee offered the best proof available under the existing conditions. He testified he lost \$20 a day after the saloon at 1916 Division Avenue was opened and lost \$2000 cash. He was compelled to close his doors in about eight months. There is proof in the record tending to show that his loss of business was occasioned by the opening of the saloon by appellant in violation of the plain terms of his contract and the jury was warranted in fixing the damages in the amount of the verdict.

The refusal of the trial court to give appellant's instruction No. 1 is assigned and argued as error. The instruction informed the jury that before plaintiff could

recover, he must prove among other things that his business had been damaged as a consequence of the breach of the contract. The execution and validity of the contract are not disputed, a breach thereof was clearly shown and the plaintiff was entitled to recover at least nominal damages without any proof of actual damages. *Body v. Condit*, 188 Ill.237; *Brandt v. Gallup*, 111 Ills.498. This instruction did not state the law correctly and it was not error to refuse it.

Appellant urges as error the giving of appellee's instructions one and two which informed the jury that if they believed from a preponderance of the evidence the contract was executed and that defendant had violated the same, their verdict should be for the plaintiff. These instructions stated correct principles of law and the instructions in the case when considered as a whole correctly informed the jury as to the measure of damages. It was not necessary for each instruction to state the measure of damages. The verdict was warranted by the evidence, no material error appears on the record and substantial justice seems to have been done. The judgment of the trial court is therefore affirmed.

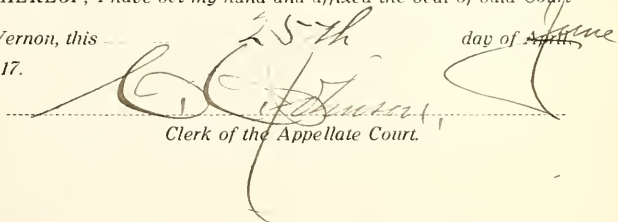
Affirmed.

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court

at Mt. Vernon, this
A. D. 1917.

25th day of June,

Clerk of the Appellate Court.

3163

Opinion of the Appellate Court

AT AN APPELLATE COURT, begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March, in the year of our Lord, one thousand nine hundred and seventeen, the same being the 27th day of March, in the year of our Lord, one thousand nine hundred and seventeen.

Present:

Hon. James C. McBride, Presiding Justice.

Hon. Franklin H. Boggs, Justice.

Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the ^{Eighteenth} ~~Thirteenth~~ day of ^{June} ~~April~~, A. D. 1917, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

W. G. Markman,

Appellee

vs.

No. 24

March Term, 1917
~~October Term, 1916.~~

O. L. Hallbeck et al,

Appellants

206 I.A. 465

ERROR TO
APPEAL FROM

Circuit

COURT

Edwards

COUNTY

TRIAL JUDGE

HON.

J. C. KERN



March Term, 1917.

W. C. Markham,)	
Appellee)	
v.)	Appeal from Edwards.
O. L. Hallbeck, et al,)	
Appellants.)	

Opinion by Higbee, J.

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This was an action brought before a justice of the peace by appellee, W.C. Markham, against appellants, O. L. Hallbeck and J. L. Hallbeck, partners under the firm name of Hallbeck and Son engaged in the retail implement and machinery business, at West Salem, Illinois. The suit was to recover damages for the alleged breach of a warranty in the sale of a gasoline engine by appellants to appellee. The trial, on an appeal to the circuit court of Edwards county, resulted in a verdict for appellee in the sum of \$96.67. By this appeal appellants seek to reverse the judgment entered on this verdict.

The questions of whether there was a warranty of the engine, and if so, whether the engine fulfilled that warranty, were questions of fact to be determined by the jury. By returning a verdict for the plaintiff the jury decided both these questions in the affirmative. Appellee testified O. L. Hallbeck told him the engine was just as good as a new one, had been used only two weeks, was in first class condition and would do the work for which appellee

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wanted it. G.F. Hallbeck admitted he told appellee the engine would do the work and take care of the business he was buying it for and serve his purpose just as well as a new one from the factory. It is admitted also by appellants that they knew appellee wanted the engine to use in lighting his jewelry store, and that the water jacket on the engine was cracked when it was sold, and did not ~~xxx~~ inform appellee of that fact. The evidence shows that appellee had trouble with the engine. Appellants contend, however, this was due to the fact appellee did not know how to run the engine, and there is some evidence tending to support this contention. There is also evidence tending to show that the engine did work well before sale, and after it was returned to appellants, and that the crack in the water jacket did not materially affect the working of the engine. The jury saw and heard the witnesses testify, and there was sufficient proof to warrant the finding there was an express warranty and that the engine failed to fulfill that warranty. Under the well and long established rule that the verdict of the jury should not be disturbed unless clearly against the weight of the evidence, that finding should not be set aside.

Counsel for appellants assign as error the giving of all but one of the eight instructions given for appellee. These instructions were not carefully drawn and contained minor inaccuracies but when considered as a whole and treated as a series they do not contain such error as would warrant a reversal. Complaint is also made of the court's action in refusing to give appellants' eighth instruction. This instruction informed the jury, among other

things, that in the sale of second hand goods no warranty is implied. There was no contention in this case of any implied warranty, and appellants so state in their argument. It is possible moreover that second hand goods may be sold under such circumstances as to raise an implied warranty, such for instance as the sale of goods for a known particular purpose. It was not error to refuse this instruction.

Appellants also urge as error the admission over their objection, of the testimony of appellee, that W. L. Halbeck agreed not to sell the note given in payment for the engine. While this evidence in no way tended to prove a warranty or breach thereof, yet it was a part of the transaction and the admission of the same was not material error. The question asked appellee as to whether appellant didn't say at the end of two weeks "that the engine was in good condition," was leading but the information sought to be elicited was proper and the form of the question was not so material as to amount to reversible error.

The verdict is not against the weight of the evidence, no material error appears on the record and the judgment should accordingly be affirmed.

Affirmed.

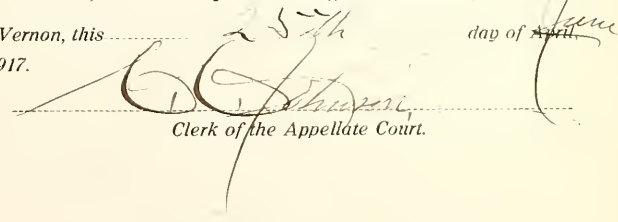
Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court

at Mt. Vernon, this
A. D. 1917.

25th day of June


Clerk of the Appellate Court.

NOIN

Opinion of the Appellate Court

AT AN APPELLATE COURT, begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March, in the year of our Lord, one thousand nine hundred and seventeen, the same being the 27th day of March, in the year of our Lord, one thousand nine hundred and seventeen.

Present:

Hon. James C. McBride, Presiding Justice.

Hon. Franklin H. Boggs, Justice.

Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the ^{Eighteenth} ~~Thirteenth~~ day of ^{June} ~~April~~, A. D. 1917, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

George A. McHatton,

Appellee

vs.

No. 36
March Term, 1917
~~October Term, 1916~~

Alton, Granite & St. Louis Traction
Co.,
Appellant

206 I.A. 474

ERROR TO
APPEAL FROM

City

COURT

Alton

COUNTY

TRIAL JUDGE

HON. JAMES E. DUNNEGAN



March Term, 1917.

George A. McHatton,

Appellee

v.

Alton, Granite & St. Louis

Traction Company,

Appellant

Appeal from City Court of Alton.

Opinion by Higbee, J.

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This was an action on the case by appellee, George A. McHatton, in the city court of the City of Alton, to recover from appellant, the Alton, Granite and St. Louis Traction Company, damages on account of personal injuries. The declaration consisted of one count and alleged in substance that appellant was the owner of and operated a line of street cars in the city of Alton; that appellee became a passenger on one of its cars July 15, 1916, on Washington street, to be carried to or near the intersection of Washington and Brown streets; that it was the duty of appellant to keep and cause the car to remain stationary a reasonable time to enable appellee to alight therefrom safely; that appellant did not regard such duty, but while appellee in the exercise of due care and diligence was about to alight, appellant negligently caused the car to be suddenly and violently started, whereby appellee was thrown from the car with great violence and suffered severe injuries. The plea of general issue was filed and the case tried before a

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jury. A verdict for \$500 was returned and the traction company has appealed to this court.

Appellee contended on the trial that the car was started just as he was stepping from the rear platform to the lower step. Appellant insisted appellee made no move or attempt to alight until after the car was started. This was the principal fact controverted on the trial. Five witnesses testified in behalf of appellee including his son and himself, as to the circumstances of the accident and four, including the conductor and motorman, testified in that respect for appellant. Counsel for appellant devote a considerable part of their brief and argument to their contention that the verdict is contrary to the evidence. The evidence is somewhat contradictory on some of the controverted facts, but the verdict should not be disturbed were the record free of error.

Two instructions were given in behalf of appellee and nineteen in behalf of appellant. The trial court's refusal to give the following instruction offered by appellant is assigned as error: "You are instructed that the declaration does not charge, as a ground of recovery, that the defendant did not keep its car waiting at Brown street a sufficient length of time for plaintiff to get off of such car, but that the actionable negligence charged is the sudden and violent starting of the car throwing plaintiff therefrom. You are further instructed that unless such actionable negligence is proven as charged your verdict must be not guilty." This instruction contains nothing material that is not fully covered by other instructions given for appellant. The change in the declaration appears to be as much a charge of failure to wait a reasonable time, as a charge of negli-

By JOHN BURNET, BISHOP OF SALISBURY.

IN TWO VOLUMES.

LONDON, Printed by J. Sturges, at the Black-Swan in St. Dunstons Church, 1724.

IN TWO VOLUMES.

THE FIRST VOLUME.

THE SECOND VOLUME.

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THE TWENTY-FIRST VOLUME.

THE TWENTY-SECOND VOLUME.

gence in starting. If the car started while appellee in the exercise of due care was alighting therefrom, it necessarily failed to wait a reasonable time.

The second instruction given for appellee reads as follows: "The court instructs you as a matter of law, that where two witnesses testify directly opposite to each other on a material point and are the only ones that testify directly to the same point you are not bound to consider the evidence evenly balanced or the point not proved; you may regard all the surrounding facts and circumstances proved on the trial, and give credence to the one witness over the other, if you think such facts and circumstances warrant it." The giving of this instruction is assigned as error. While this instruction is somewhat argumentative and is not to be vividly amended, yet it does not contain reversible error.

The assignment of error upon appellee's first given instruction presents a more serious question. It is as follows: "The court instructs the jury that the defendant street car company is responsible to passengers for the wrongful acts of its servants and agents while employed in running their cars, when such wrongful acts are committed in connection with the operation of its cars, and if you believe from all the evidence in this case that the defendant street car company stopped its car at or near the corner of Washington and Brown streets and then suddenly started the same, while plaintiff was in the act of alighting therefrom, and thereby caused the plaintiff to be thrown from the car and injured, if you believe from the evidence that the plaintiff was in the exercise of all due care and caution for his own safety at the time, then your verdict will be

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for the plaintiff in such an amount as you may believe from the evidence he is entitled to recover.' Several objections were urged to this instruction, the most serious of which is that it leaves the jury free to give such damages as they might think the plaintiff ought to recover without confining them to any legal rule for fixing damages. In *Suvel Coal Co. v. Howell*, 504 Ill.515, an instruction told the jury that in case they found the defendant guilty, it would become their duty to assess the damages and give to the plaintiff such a sum as in their judgment would fairly compensate the widow and next of kin for the pecuniary injury or loss not to exceed however, the amount sued for. The opinion in that case disapproved of said instruction and reviewed a number of cases bearing upon the question, saying in part: "In *Knightslinger v. Gan*, 68 Ill.230, which was an action of trespass on the case, the court gave to the jury an instruction, which told them that they should find for the plaintiff such damages as in their judgment, from the evidence in this cause, the plaintiff ought to recover, not exceeding the sum of \$3000;" and in regard to this instruction we there said: The instruction was wrong, upon the point of damages in telling the jury they might find for the plaintiff such damages as in their judgment from the evidence in the cause the plaintiff ought to recover. This left the jury free scope to give such damages, as according to their individual notions of right and wrong, they might think the plaintiff ought to recover, unguided by any legal rule of damages, and without regard to the damages sustained. In *Waldron v. Harcier*, 82 Ill.55, an instruction was held to be erroneous, which directed the jury: 'If they found for the

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plaintiff to allow such damages as they believed from the evidence she was entitled to' and we there said 'it should have been such damages as she had sustained, and not have given to the jury the wide latitude of allowing her such damages as they might deem she was entitled to'.

Under the foregoing authorities this instruction is clearly erroneous and no other instruction given on either side covered the same subject or cured the error therein contained. Appellant assigns as error and contends in its argument that the verdict was excessive and under the evidence this contention is not without merit. It would therefore appear that the error in the instruction concerning the assessment of damages may have been particularly injurious to appellant as the jury were not thereby confined to the damages sustained by appellee in determining the amount to be allowed, but were given liberty to give a verdict for such an amount as they believed from the evidence appellee was "entitled to recover".

For the error contained in instruction number one given for appellee the judgment will be reversed and the cause remanded.

Reversed and remanded.

Not to be reported in full.

THE FIRST PART OF THE HISTORY OF THE
LIFE OF THE LATE LORD OF THE
TREASURY OF THE KINGDOMS OF GREAT
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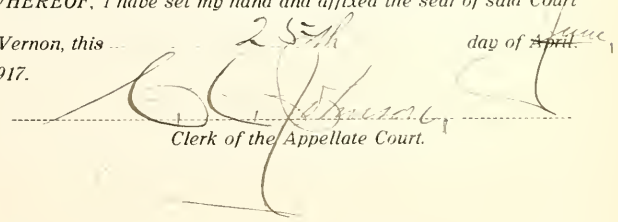
I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court

at Mt. Vernon, this ...

A. D. 1917.

25th day of April, 1917


Clerk of the Appellate Court.

NOIN

3166

Opinion of the Appellate Court

AT AN APPELLATE COURT, begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March, in the year of our Lord, one thousand nine hundred and seventeen, the same being the 27th day of March, in the year of our Lord, one thousand nine hundred and seventeen.

Present:

Hon. James C. McBride, Presiding Justice.

Hon. Franklin H. Boggs, Justice.

Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the ^{Eighteenth} ~~Thirteenth~~ day of ^{June} ~~April~~, A. D. 1917, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

Richland Lilling Co.,

Appellant

vs.

No. 45.

March Term, 1917
~~October Term, 1916.~~

Lane Bros. & Erwin,

Appellees

206 I.A. 476

ERROR TO
APPEAL FROM

Circuit COURT

Williamson COUNTY

TRIAL JUDGE

HON. N. O. POTTER

March Term, 1917.

Richland Milling Company,)	
Appellant)	
v.)	Appeal from Williamson.
Lane Bros. & Irwin,)	
Appellees)	

Opinion by Higbee, J.

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Appellant, Richland Milling Company, a corporation, brought suit before a justice of the peace against Ed Lane, John Lane and Will Irwin, having done business as Lane Bros. & Irwin, appellees, for \$184.81 for a bill for feed, furnished the latter by the Milling Company. In the circuit court to which the case was appealed, it was stipulated between the parties, that the claim of appellant is substantially correct; that appellees bought the goods indicated by the bill attached to the claim and that the prices charged were reasonable; that appellant would not be required to prove its books or its bill but that appellees depended entirely upon the defense of set off or payment. There was also filed in the circuit court, a plea of set off by appellees, claiming pay for 3718 yards of dirt handled by them at 27½ cents per yard, amounting to \$1022.45, out of which they offered to pay appellant the amount due it upon its bill.

Appellees' claim of set off appears to have been based on a contract for grading for a switch and placing

drain pipe, signed by John D. Vogt, Lane Bros. & Erwin and appellant. Appellant claims to have paid Vogt and appellees all it owed them for the work done, amounting to \$1596.28, and it appears that no claim was made for any further amount due the contractors, until it was filed as a set off to this suit in the circuit court. The trial resulted in a verdict for \$52.00 in favor of appellees and for that amount judgment was entered by the circuit court.

Appellees have filed no brief here and for this reason the judgment will be reversed and the cause remanded pro forma, in accordance with rule 27 of this court. We are especially inclined to enforce this rule here for the reason that it does not appear from the record how the jury, under the proofs, could have arrived at a verdict in favor of appellees for the amount named, also because this suit is against Lane Bros. & Erwin while the claim of set-off is based upon a contract with and work done by John D. Vogt and Lane Bros. & Erwin, and it does not appear from the proofs why a set-off, claimed to be due appellees and Vogt, could be allowed against appellant in favor of appellees alone.

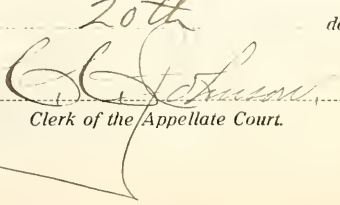
Reversed and remanded.

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court

at Mt. Vernon, this 20th day of April,
A. D. 1917.


Clerk of the Appellate Court.

NOIN

(3191)

Opinion of the Appellate Court

AT AN APPELLATE COURT, begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March, in the year of our Lord, one thousand nine hundred and seventeen, the same being the 27th day of March, in the year of our Lord, one thousand nine hundred and seventeen.

Present:

Hon. James C. McBride, Presiding Justice.

Hon. Franklin H. Boggs, Justice.

Hon. Harry Higbee, Justice.

CHARLES C. JOHNSON, Clerk.

THOMAS E. PASLEY, Sheriff.

And afterwards, to-wit: On the ^{Eighteenth} ~~Thirteenth~~ day of ^{June} ~~April~~, A. D. 1917, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

People ex rel Bothman et al,

Appellees

vs.

No. 46
March Term, 1917
~~October Term 1916~~

The Title Guaranty & Surety Co.,

Appellant

Impleaded with J. W. Brown

206 I.A. 477

ERROR TO:
APPEAL FROM

Circuit

COURT

Jackson

COUNTY

TRIAL JUDGE

HON.

CHARLES B. MILLER

March Term, 1917.

The People of the State of Illinois	}	
for the use of Mary Bothman, et al		
Appellees	}	
v.		
The Title Guaranty & Surety Company,	}	Appeal from Jackson.
Appellant		
Impleaded with James W. Brown.		

Opinion by Higbee, J.

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This case was heretofore before this court upon an appeal from the judgment of the trial court sustaining the demurrer of defendants to the declaration, which we held to be erroneous, the judgment being reversed and the cause remanded with directions to overrule the demurrer. The People etc. v. Brown, 194 Ill.App.246. The facts of the case as set forth in the declaration, are fully stated in that opinion. Upon the remanding order in that case being filed in the circuit court of Jackson county, defendant James W. Brown, filed two and defendant, The Title Guaranty & Surety Company filed eleven special pleas to the declaration. To those pleas plaintiff filed general demurrers, which were sustained by the court and defendants elected to stand by their pleas. Judgment was entered against defendants in the sum of \$5000 debt, and \$5000 damages. From that judgment, The Title Guaranty & Surety Company alone, appealed.

The eleven special pleas filed by appellant alleged

in substance that the said James M. Brown issued the warrants involved without any authority from the county board of Jackson county; that at the time of the issuance of said county orders the county of Jackson was not indebted to him and the same were illegal; that he negotiated and sold them to usees as a private individual and not as county clerk; that such warrants were not negotiable and usees bought them for speculative purposes; that the sale and negotiation of them to usees were not official acts; that the loss of usees if any was not the direct and proximate result of the issuance of such warrants but was the direct and proximate result of the subsequent act of said Brown as a private individual in selling and transferring said warrants to them for a large discount and for speculative purposes and for their individual gains and profits; that there is no joint right of action in usees; that appellant was only legally obligated for the faithful discharge of the official duty of said Brown as such clerk and that the acts here complained of were "beyond the scope, power and authority" of such clerk; that such warrants were not signed by the treasurer of Jackson county; that the county had not paid any of them; that they created no liability against the county; that said Brown did not violate any of the conditions of his bond as county clerk and that usees by purchasing them acquired no right of action against the county.

In the former opinion of this court in this case, it was said, "Counsel for appellee (appellant here) in stating their position say: 'We contend that the declaration in this case does not state a good cause of action, because ~~of~~ the sale of the warrants to the usees was not an official act, but was the clerk's own private speculation and transaction

which was no part of his official duty, and which the law did not require him to do in the performance of his official duty, and therefore his surety is not liable'. Counsel for appellee further state that it appears the warrants have not been paid and the county not damaged, and lost nothing by reason of the negotiations of these orders; that: 'This is an essential and material matter to be kept in mind throughout this argument'. It is the contention of appellee that the declaration does not state a cause of action: First, because the county has lost nothing by the transaction and that the bond does not protect these individuals even if they were injured in these particular transactions; Second, that the acts of the clerk, at least that of selling and assigning the warrants, was not an official act, and 'the thing that caused the injury, if one has been sustained, to the usees, was not the issuance of the warrants but the transfer or sale of them by Brown in his private capacity as contra-distinguished from his official capacity;' and then urges that the efficient cause which led to the obtaining of the money was the acts of the clerk in negotiating or selling the warrants and not the issuing of the warrants." From this it will be readily seen that the pleas in this case are but a re-statement of appellant's contentions in the former case. All questions raised here by the trial court's action in sustaining appellee's demurrers to the pleas were fully presented to this court in that case and were disposed of by the opinion therein adversely to appellant's contentions. According to the reasoning followed and the authorities cited in that opinion, the pleas in this case do not state a defense to the declaration, and the demurrer to them was properly sustained. The judgment of the trial court will be affirmed.

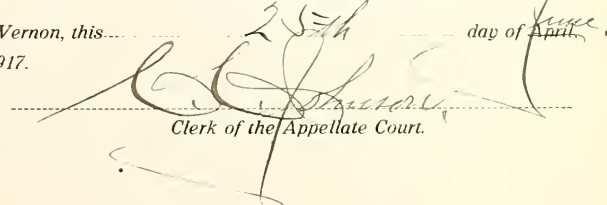
Affirmed.

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court

at Mt. Vernon, this..... 25th day of June, A. D. 1917.


Clerk of the Appellate Court.

NOIN.

Irene Rice, by her guardian, John A. Walker,
Appellee,

vs.

Royal Neighbors of America, Appellant
Appellant,

Appeal from Jersey

Opinion by Thompson, P. J.

petition for hearing tried 7/2/17
Irene Rice, a minor, by John A. Walker her guardian, brought suit in assumpsit against the Royal Neighbors of America, a fraternal insurance corporation, upon a certificate issued to Alta M. Rice in the sum of \$1000 payable to her daughter, Irene Rice. The declaration consists of a special count, which pleads the benefit certificate in haec verba with an averment that Alta M. Rice died in good standing and had complied with all the conditions of the benefit certificate. The fifth of the conditions and agreements in the certificate is:— If the member holding this certificate shall * * * or if death shall result from criminal or self inflicted abortion or miscarriage * * * then this certificate shall be null and void and all rights accrued on account of this certificate shall be forfeited.

The defendant filed the general issue and special pleas. The special pleas aver that the contract sued on was between defendant and Alta M. Rice and consists of the by-laws of defendant, the application and the benefit certificates. It pleads the fifth condition in the certificate and avers that Alta M. Rice came to her death as the result of a self inflicted abortion contrary to the provisions of the contract. Several other special pleas set up the same defence in different forms.

The trial court refused to give a peremptory instruction requested by defendant, but did instruct the jury that the evidence conclusively shows that Alta M. Rice produced upon herself an abortion or miscarriage and the inquiry of the jury should be confined to the question whether or not her death resulted either directly

(Page 1)

or indirectly from the self inflicted abortion or miscarriage.

The jury returned a verdict for the plaintiff for \$1.129.12. A motion for a new trial was overruled and judgment rendered on the verdict.

The appellant insists that the verdict and judgment are against the clear preponderance of the evidence and appellee insists that although the insured committed an abortion on herself, that the abortion did not cause her

*Petition for
R.H. [unclear]
[unclear]
July 2, 1917*

206 I.A. 492

death but she died from pneumonia.

The physician who attended the deceased was first called on the afternoon of Sunday, August 10th, and found her suffering from hemorrhage and a small fetus in the vagina. He asked her what brought about her condition, and she told him she had used a hard rubber catheter and requested the physician not to tell her friends the exact cause.

There was an inquest and the coroners' jury found that she died from "general peritonitis as a result of her performing an operation by inserting a catheter by her own hand." There is no evidence that any physician attended the deceased until after she inflicted the abortion on herself and after the physician was called, she was only treated for conditions resulting from the miscarriage. She worked in a shoe factory and lost no time before using the catheter. She quit her work and returned home about ten o'clock in the morning of the day she used the catheter. There is some testimony given by members of her family and friends which tends to show that she had a cold and a slight cough for a few days before the abortion, but the evidence describing her condition at the time of and subsequent to the miscarriage leaves no reasonable doubt as to the cause of her death. She was infected and badly swollen. She had a high fever and rapid pulse without any cold noticeable and she made no complaint of cold to the physician. The physician, who treated her, examined her lungs and other organs

(Page 2)

to see if she was in condition to take an anesthetic in order that her uterus might be curetted. Her functional organs were found in a satisfactory condition and an anesthetic was given and the operation performed but she died in about a week thereafter.

The manifest preponderance of the evidence shows that the abortion was the cause of her death. The judgment is reversed with a finding of fact.

Reversed.

Finding of fact to be incorporated in the judgment. The death of the insured was the result of and caused by a self inflicted abortion.

(Page 3)

3171

206 I.A. 493

Gen. No. 6665. October Term, 1916. Ag No. 91

John Y. Chisholm, Trustee in Bankruptcy, etc. Appellee

vs.

The First National Bank of LeRoy, Appellant

Appeal from McLean

Opinion by Thompson, P. J.

*Modified and
Re-Filed May 1, 1917
Petition for
Re-hearing Denied
Opinion Modified
and Re-Filed July
2nd 1917*

This is an action in assumpsit brought to the September Term, 1911, of the circuit court of McLean county by John Y. Chisholm, trustee in bankruptcy of the Clarke Grain and Elevator Company of LeRoy, against the First National Bank of LeRoy, to recover certain payments of money made to it, which are averred to be preferential and contrary to the provisions of the national bankruptcy law. There have been three verdicts and judgments rendered in favor of the plaintiff. The first was for \$8815. That judgment was reversed by this court and the cause remanded. Chisholm vs. First National Bank, 176 Ill. App. 382. The second was for \$10,718.50 and was affirmed by this court, (Chisholm vs. First Nat. Bank, 190 Ill. App. 354,) but was reversed and remanded by the Supreme Court, because it was in part for money received and credited to a running account from which checks were thereafter paid, and concerning which the jury should have been instructed as to the law applicable thereto. Chisholm vs. First National Bank, 269 Ill. 110. The third judgment of the circuit court was rendered March 16, 1916, for \$6,297. 20. From that judgment the defendant prosecutes this appeal.

There has not been any change in the pleadings since the first trial in the circuit court, except to increase the ad damnum from \$10,000 to \$15,000. The evidence presented at the last trial was the record of the evidence introduced at the second trial, with the exception that some evidence was excluded, which had been criticised in the opinion of the Supreme Court. The opinion of that court states very fully the issues and the facts disclosed by the evidence, and it is not necessary to make any further statement of the facts at this time but that statement will be adopted, as the statement of the evidence and facts.

(Page 1)

It is contended that the verdict and judgment are contrary to the law and the manifest weight of the evidence. The statement of the evidence, and the law relevant to it, in the opinion of the Supreme Court shows that there is sufficient evidence to sustain the judgment and fully answers such contention of appellant.

cd / It is also insisted that the trial court erred in refusing three instructions requested by appellant. The first refused instruction which appellant argues should have been given is:—"The jury are instructed that the fact that the court has instructed you respecting the matter of measure of damages which may be allowed the plaintiff, in case you find that he is entitled to recover under the evidence, and these instructions, and the fact that defendant's counsel may have discussed the subject in argument before you, is not to be taken or regarded as implying in any way that the court has any opinion one way or another, or said counsel are admitting, that the plaintiff is entitled to any allowance of damages whatsoever." This instruction is merely cautionary. It states a correct rule of law and while it might have been given, it was not reversible error to refuse it.

Instruction number R, the refusal of which it is argued is reversible error, is:—"The court instructs you that in this case plaintiff is seeking to recover from the defendant the amount which the defendant received from the Clarke Grain and Elevator Company in payment of its note, on the ground that when the same was paid the defendant knew or had reasonable cause to believe that such payment would give it, the defendant, a greater percentage of its claim against the Clarke Grain and Elevator Company than other creditors of the same class would receive, in violation of the provisions of the Bankruptcy Act. You are further instructed that the law presumes, and therefore it is your duty as jurors to presume, that the defendant did not have reasonable cause to believe that such payment to it would give it a preference, and that the plaintiff can-

(Page 2)

not recover unless he has proved that the defendant knew or had reasonable cause to believe that such payment would give it the preference over other creditors of the same class."

In instruction number O given for appellant, the court after informing the jury as to some of the lawful rights of appellant to do certain things, then informed the jury that, "in this case plaintiff cannot recover unless he has proved by a preponderance of the evidence that at the time the Clarke Grain and Elevator Company note was paid to the defendant, it, the defendant, had knowledge of facts showing that the Clarke Grain and Elevator Company was insolvent, or had reasonable cause to believe that the said Grain and Elevator

Company was insolvent, and that the payment to it of said note would give it, the bank, a greater percentage of its claim than other creditors of the same class would receive."

~~This given instruction fully informed the jury of the legal proposition involved in instruction R.~~ If the evidence was evenly balanced on the issues referred to in the instruction, the appellee could not recover and the given instruction told the jury appellee could not recover unless he had proved the enumerated issues by a preponderance of the evidence.

The refused instruction is also faulty in not referring to the evidence and might have been refused for that reason. If it had stated that plaintiff cannot recover unless he has proved by the evidence, etc. it would not have been error to have given it, neither would it be reversible error to refuse it.

The other refused instruction, the refusal of which appellant insists is reversible error is:—"If you believe from the evidence and under the instructions of the court that the Clarke Company was insolvent at the time that it opened its account with the defendant, and that it remained so during the continuance of its transactions with the defendant bank, and that at the close of such transactions the Clarke Company had received more money from the bank than it had

(Page 3)

repaid to the bank, and that the payment of the note in question and interest thereon was a payment upon an open account and in the regular course of the business as it was transacted between the Clarke Company and the Bank, and that the Bank at the time it received such payment did not know or have reasonable cause to know that the Clarke Company was insolvent, your verdict should be for the defendant."

The appellee in this suit is seeking to recover as stated in the opinion of the Supreme Court, "the proceeds of the sale of the elevator and crib or corn amounting to \$9677.00, as a preferential payment, which, with interest at the time of trial amounted to \$10,718. The amount of the verdict and judgment subsequently rendered."

The sum of \$9677.00 received by appellant from the Clarke Grain and Elevator Company on March 20, 1911, is made up of two checks, one for \$6360 and the other for \$2337 received from Crumbraugh, payable to the order of appellant for the elevator and corn sold to

Crumbraugh by the Grain and Elevator Company, and of a draft for \$980 with bills of lading attached, which the cashier of appellant obtained from the company when it was about to forward the draft to one of its creditors named Boyd, at Indianapolis. The appellant applied \$5040 of the money received from Crumbraugh to the payment of the \$5000 note, and the balance of the Crumbraugh checks and the \$980 draft were credited to the overdrawn accounts of the company known as the Empire and LeRoy accounts. The LeRoy overdraft was \$4027.51. The Empire account overdraft was \$1,438.55.

The Supreme Court in its opinion states the law applicable to this case, both as to the overdraft and the note, as follows:—"Plaintiff in error insists the grain company was insolvent at the time it commenced business in LeRoy, which fact was unknown to plaintiff in error until after March 20, and that the net result of the transactions between it and the grain company was to increase the assets of the latter company more than \$1,000, and that therefore, under the 'net result rule,' the payments made to it are not voidable as preferences. *Jaquith vs. Alden*, 189 U. S. 78, (47 L. ed. 717,) and

(Page 4)

Wild & Co. vs. Providential Life and Trust Co., 214 U. S. 292, (57 L. ed. 1003,) and other cases, are cited in support of this contention. In each of the above cases cited there was a running account between the parties, and the effect of the payments made was to keep the account alive, with the result that new credits were extended and new goods placed in the stock which resulted in a net gain to the bankrupt estate, and it was there held that payments made on an open account, in the regular course of business, for goods sold and delivered within four months' period, without knowledge on the part of the creditor of the debtor's insolvency, were not voidable as a preference where the net result of such transactions was to increase, and not deplete, the creditor's estate. Under these holdings it would seem the plaintiff in error had a right to have such questions submitted to the jury under proper instructions, but no proper instruction on that question was offered by it. The instruction tendered was * * *. This instruction omitted, among other elements, the elements of open account, knowledge of insolvency and payments made in the regular course of business, and was properly refused."

With reference to the note, the opinion of the

Supreme Court states:— "The above two cases (National City Bank vs. Hotchkiss, 231 U. S. 50; Mechanics and Metals Nat. Bank vs. Ernst, 231 U. S. 60,) illustrate the point in question and are clearly distinguishable from each other and from the case at bar on the facts, and manifestly can have no application to any question involved here, except the payment on the \$5000 note made the morning of March 20, 1911. As to this item a different situation is presented. The money, which it was paid, never was deposited in the general account of the grain company and the situation of mutual accounts between the parties as debtor and creditor was never established as to it. On the contrary, the money was received and was applied directly in payment of the note with the intention of extinguishing the pre-existing debt evidenced by it. The payment on the note, therefore, is governed by the

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rule announced in Pirie vs. Chicago Title and Trust Co., 182 U. S. 444, Hotchkiss vs. National City Bank, supra, and Mechanics and Metals Nat. Bank vs. Ernst, supra, and is voidable as a preference."

The trial court gave at the request of appellant, instruction B, that:— "If you believe from the evidence that the defendant was interested in the sale of the elevator in question only in order to reduce the Clarke Company's overdraft and to assist the Clarke Company to procure money with which to continue business and did not at the time of such sale have reasonable cause to know that the Clarke Company was insolvent and that the defendant did not intend to obtain out of the Clarke Company's assets a greater per cent of the Clarke Company's indebtedness to it, than other creditors would receive of the money due them your verdict should be for the defendant." Instruction C, told the jury:— "If you believe from the evidence that the defendant at the time of the payment of the note in question believed that the Clarke Company owned enough corn to pay all its debts and have nearly \$1000 over and that it did not know or have reasonable cause to believe that the Clarke Company was insolvent at such time your verdict should be for the defendant." By instruction H, given for the defendant, the jury were told "**that the only issue before you in this case is whether the payment of the \$5000 note and \$40 interest thereon by the Clarke Company to the defendant constitutes a preference within the meaning of the Bankruptcy Act.**" Instruction I, given for defendant, told the jury that if the plaintiff failed to prove

by a preponderance of the evidence that at the time defendant received the Crumbaugh checks, it had knowledge of facts which would cause a reasonable man to believe the Clarke Elevator Company was insolvent, and the receiving payment of the \$5000 note would give it a preference over other creditors, the verdict should be for the defendant. Instruction J. applies the same rule to both the overdraft and the note.

The instructions given at appellant's request are very contra-

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dictory. The Supreme Court directed the trial court to instruct the jury concerning the "net result rule" as to the money applied in payment of the overdrafts. Instead of so instructing the jury, the court, by instruction H, took every issue from the jury, except the one involving the note, "the only issue before you in this case is," etc. The opinion of the Supreme Court states that as to the note a different situation is presented. "The money with which it was paid was never deposited in the general account of the grain company and the situation of mutual accounts between the parties as debtor and creditor was never established as to it." The money was received and applied directly in payment of the note with the intention of extinguishing the pre-existing debt evidenced by it. On examination of the bank books of appellant as they appear in the record, it will be found that the note was not charged up in the overdraft account, and the money paid on the note was not credited to that account.

Instruction F, attempts to make the "net result rule" applicable to the money paid on the note. The Supreme Court states that that rule does not apply to the money paid on the note. Instruction F, further states that if "the payment on the note in question and interest thereon was a payment upon an open account" etc. The instruction is inconsistent and contradictory within itself and attempts to state as facts matters for which there is no foundation in the evidence, and as has been stated, the rule of law attempted to be announced is not applicable to this note. There was no error in refusing the instruction.

No other question is presented for review. The *Made a Motion for a new trial on the ground that it has assigned cross errors, but* appellee states that it has assigned cross errors, but "concedes that this court is bound to follow the decision of the Supreme Court and that it cannot do otherwise than affirm this judgment." ~~However, while~~ ~~appellee made a motion for a new trial and has filed an~~

~~additional abstract of the record, no cross errors have
been assigned on the record in this court, nor are there
any cross errors contained in the additional abstract.~~

(Page 7)

The judgment is for the sum paid on the note with interest thereon at five per cent. ~~There is no error in
the record against appellant.~~ The judgment is therefore affirmed.

Affirmed.

(Page 8)

3175

206 I.A. 512

Gen. No. 6671. October Term, A. D. 1916. Ag. No. 69.

Emma Forwood Denny, Appellant,

vs.

John J. Cox, Appellee.

**Appeal from Circuit Court
Macoupin County.**

Eldredge, J.

Appellant filed her bill in chancery for the specific performance of a written contract for the sale of real estate at the June Term, 1914, of the Circuit Court of Macoupin County. A decree was entered dismissing the bill for want of equity, to reverse which this appeal is prosecuted.

The contract provided that appellant, in consideration of \$12000 to be paid by appellee, agreed to convey by warranty deed the land in question and to deliver to appellee on or before March 1, 1914, an abstract showing a merchantable title thereto. The abstract, when furnished, showed several defects in the title so that it became necessary for appellant to file a bill to quiet title. The only persons made defendants to the bill to quiet title were the unknown heirs and devisees of certain named persons and the unknown owners of and parties in interest in the said real estate. The only service had, or that could have been obtained under the defendants to the bill, was by publication. Under Section 19 of the Chancery Act, a party who has not been served with summons or copy of the bill and has not received the notice required to be sent him by mail in case of publication, shall have three years in which to petition to open up the decree unless he is notified of the entry of the decree, in which latter case he shall

(Page 1)

have one year from the receipt of such notice. In the case of Smith vs. Hunter, 241 Ill. 514, it was held:

"The general rule is, that the sufficiency of an abstract of title, upon a bill for specific performance, is to be determined as of the date fixed by the contract or by the agreement of the parties when the party was to furnish the abstract and the deal was to be closed, and not at some time subsequent to the filing of a bill for specific performance. (Street vs. France, 147 Ill. 342; Gage vs. Cummings, 209 id. 120; Clark vs. Jackson, 222 id. 13.)"

The abstract in the case at bar when furnished did not show a merchantable title in appellant. Objection is also made that the bill to quiet title did not make all of the persons necessary to accomplish that purpose parties defendant, but without discussing that question it is sufficient to say that if the bill to quiet title was good and would have eventually cured the defects therein,

provided none of the defendants subsequently appeared and had the decree opened up, appellee was not compelled to pay the purchase price of the land and wait three years before he could be sure that he had a good title thereto. Smith vs. Hunter, *supra*.

The court properly dismissed the bill for want of equity and the decree is therefor affirmed.

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3175
206 L.A. 527
Gen. No. 6593. October Term A. D. 1916. Ag. No. 8.

Lindsey Corbly, Defendant in Error,
vs.

Lida Corbly, Plaintiff in Error, and Fred
Corbly

Error to the County Court of
Ford County.

Graves, J.

This is an action in forcible entry and detainer begun in the County Court of Ford County by Lindsey Corbly, defendant in error against Lida Corbly and her husband, Fred M. Corbly. Lida Corbly brings the record here by writ of error for review.

The term began on February 14, 1916. Lida Corbly demanded a jury trial. The case was set for trial for February 22, 1916 at 1: 30 P. M. and a jury was summoned to appear at that time to try the case. On that day plaintiff in error filed her motion for a continuance, which was heard and allowed and the cause was continued until March 17, 1916. On that date plaintiff in error filed her second motion for a continuance which was heard and denied. The cause was tried by a jury. Plaintiff in error made no defense. The jury found the issues for the plaintiff and judgment was entered awarding the possession of the property in question to him.

The only question worthy of consideration presented by this record is whether the court committed reversible error in denying the second motion for a continuance filed by plaintiff in error.

The motion is based mainly on the ground that the health of plaintiff in error was such as to render it inadvisable for her to

(Page 1)

attend the trial as a witness. There is no sufficient showing as to when her health was likely to be such as to warrant her in appearing in court, or of any diligence in securing her deposition between the 22nd day of February when the case was first continued, and the 17th day of March, the time to which it was continued, or of any reason why the same was not taken, or of why it would not have been satisfactory. The motion addressed itself solely to the discretion of the trial judge, and we see no abuse of that discretion in the denial of it.

The exercise of a discretionary power by a court is never error unless it is clearly abused.

There are numerous matters set up in the affidavit that are entirely foreign to the case. These are of course without force as a cause for a continuance.

*Re Heavens
Revised
July 2nd 1917*

ed that the signature purporting to be hers on the lease

Plaintiff in error urges with apparent earnestness that the fact that her affidavit for a continuance showed on was a forgery, and that no one else could so well testify to that as herself, was alone sufficient to require the court to grant the continuance. Section 52 of the practice act provides that no person shall be permitted to deny the execution of an instrument in writing sued on, unless he shall verify his plea by affidavit. The plea of plaintiff in error was not verified. The execution of the instrument sued on was not in issue. She would not have been permitted to testify that the same was a forgery if she had been in court.

(Page 2)

It is next urged that the evidence in the record is not sufficient to sustain the verdict because it does not show that such notice to quit was given or demand for rent made as is required by law.

An original lease was introduced in evidence. Proof of holding over under that lease was made. Notice of the election of the landlord to terminate the lease and for immediate possession was shown. It was also conclusively shown that plaintiff in error had not only claimed adverse title to defendant in error but had undertaken to enforce that claim in court by a bill in chancery. Where a tenant claims adverse title to his landlord no notice to quit or demand for rent is necessary before bringing suit to dispossess him. **Evans v. Evans**, 163 Ill. App. 203. Where notice of the landlord's election to terminate the tenancy for non-payment of rent is given no other notice or demand for rent is necessary. **Woods v. Soucy** 166 Ill. 407. The notice proven in this case was sufficient.

There was no error in instructing the jury to find the issues for the plaintiff. All the essential elements necessary to the plaintiff's right to recover were proven and were uncontroverted. **Evans v. Evans**, 163 Ill. App. 203.

The judgment of the County Court is affirmed.

Judgment affirmed.

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3180
206 I.A. 533

Gen. No. 6627. October Term A. D. 1916. Ag. No. 38.

McNeil & Higgins Company, a corporation,
Appellant,

vs.

Greer College, a corporation, Appellee.

**Appeal from the Circuit Court of
Vermilion County**

Graves, J.

Appellant is a corporation maintaining a store in Chicago for the sale of groceries. It has a department maintained particularly for dealing with colleges and like institutions. This department is managed by a man by the name of Joseph F. Kelly.

Appellee is also a corporation. It owns a college building and certain other property in and about Hoopes-ton, but does not run the school. It was organized for pecuniary profit.

The college is run by one E. L. Bailey. He pays no rent for the use of the college buildings and property. He has what he makes out of the institution and also receives about \$1000 annually from an endowment fund. He ran a dining hall in connection with the school. He styled himself "President" of Greer College and sometimes signed letters in that style.

On August 11, 1908 he sent the following letter to the manager of the institutional department of appellant:

"Joseph F. Kelley,

Dear Sir:—Kindly send me prices of groceries for dining hall and oblige,

Yours truly,

E. L. Bailey,

Pres. Greer College."

On August 24, 1908 he wrote to the same person a second letter which is as follows:—

(Page 1)

"Dear Sir:—

Yours of the 20th inst. to hand and in reply will say that I received the journal you sent me but have not received the special letter, suppose it has been missent and will arrive later.

Thanking you for the same, I remain,

Yours very truly,

E. L. Bailey."

On August 28th he wrote a third letter which is as follows:—

"Dear Sir:—

Yours of recent date to hand, and in reply will say that if you can sell me groceries at 90 days, I will probably be able to do considerable business with you. As to responsibility I will refer you to Hamilton & Cunningham Bank or the First National Bank.

Very truly yours,

E. L. Bailey."

On September 3, 1908 appellant wrote to the First National Bank of Hoopes-ton the following letter:—

"Chicago, Sept. 3, 1908.

Gentlemen:—

We have been referred to you by Mr. E. L. Bailey, Pres. Greer College, of your city, who desires to open

*Petition for
Rehearing
Denial
July 2nd 1917*

an account with us. Will you kindly give us any information which you may have regarding the financial standing of this institution, and we can assure you that all such information will be much appreciated by us and held strictly confidential.

Thanking you in advance for a favorable response, for which we are enclosing you stamped envelope, we are,

Yours truly,
McNeil & Higgins Co.,
Per L."

On September 4, 1908, the president of the First National Bank of Hoopeston returned to appellant the foregoing letter of inquiry with the following written thereon:—

"Hoopeston, Ill., Sept. 4, 1908.

Pres. E. L. Bailey has been running the College successfully for two years, he claims a good scholarship this year, he advanced prices and should make some money. He owns a home near college and gets quite an income from that. He does not pay any rent for college building nor dormitory. The trustees keep the building in repair no expense to Bailey. He is building the college up. He also gets about \$1000 per year from an endowment fund.

Resp.

J. S. McFerren,
Pres."

On September 15, 1908 Bailey wrote the following letter to Kelley:—

"Dear Sir:—

In reply to yours of recent date will say that quite a number of the articles which you quote can be secured of our local dealers here at as low a rate as you are offering, but as there are a number of articles that you can furnish at lower rates will be glad to do business with you along that line and whenever I can secure supplies cheaper or as cheap as I can elsewhere will send you the order.

Inclosed you will find a sample order to begin with and should that prove entirely satisfactory as I trust it will, will be glad to do business with you.

Very truly yours,
E. L. Bailey."

(Page 2)

It does not appear that the officers of the appellee corporation ever knew of this correspondence until after this suit was begun.

Pursuant to this correspondence goods were sent on orders signed by E. L. Bailey. The goods were addressed to Greer College but were received and used by Bailey in his dining hall and payments made on the bills for them from time to time by check signed by Bailey. There is no proof that any of the officers of appellee ever knew of the transaction until after the payments therefor became delinquent. Neither is there any proof that Bailey was ever authorized by appellee to buy groceries or anything else on its credit.

Finally Bailey gave his note for \$1520.57 for the balance then due for groceries and appellant accepted and kept the same. On this note was written in pencil the words "taken as security." The testimony on this trial is not very definite as to when this memorandum

was placed on the note but Bailey testified that it was after he mailed it to appellant and on a former trial of this case one McGlasson, the general manager for appellant testified that it was made by his assistant after the note was received by him for appellant.

While, judging from the proof in this record, it may be true that appellant believed that Bailey was acting for appellee in buying the goods in question, there is no evidence from which a jury without acting unreasonably in the eyes of the law could conclude that appellee or any of its officers, ever authorized him so to do, or held him as having any such authority, or know that he was buying the goods or that the

(Page 3)

goods were received by it or used for its benefit or that it had been guilty of any act of omission or commission that would render it liable to pay for such goods.

At the end of all the evidence the court preemptorily instructed the jury to find the issues for the defendant. In this there was no error.

The judgment in favor of the defendant appellee here and against the plaintiff appellant here in bar of its action and for costs is therefore affirmed.

Judgment affirmed.

(Page 4)

3181
206 I.A. 534

Gen. No. 6663. October Term A. D. 1916. Ag. No. 62.

William Ryan,

Appellee,

vs.

L. E. Brown,

Appellant.

Appeal from the Circuit Court of
Tazewell County.

Graves, J.

Appellant is a farmer. He is also a breeder of trotting horses for the market. His method of marketing his horses and colts was to advertise them for sale in the Horse Review and other publications. One of these advertisements in the Horse Review reached appellee by mail. In it a horse called "The Circulation" was advertised for sale. His description as there given is as follows:

"The Circulation. Solid bay stallion. Foaled April 16, 1915. Trotter. Estimated height at maturity 15.3 to 16 hands. Registered standard. By THE EXPONENT 2:11-3-4 (son of Bingen 2:06-1-4 and Iva Dee 4, 2:12-1-2 by Onward) Dam AORTA 2:27;4) (which see on this list.)

THE CIRCULATION is a large, well grown, symmetrical, high styled, smooth, deep bodied, strong boned, good limbed colt. His dam's foals have all shown speed; every foal by his sire ever trained has been fast; taking these facts into consideration, no guess is called for—he's sure to be a trotter. He should make a magnificent 15.3 to 16 hand stock horse. Sound. Futurity engagements. Horseman, Stallion and Matron stakes."

The method of sale there advertised is a sort of auction by letter or by wire where in the prospective purchasers communicate to the seller their respective bids for the particular horses or colts desired. This advertisement contains the following: * * * "I point out every known unsoundness or blemish. If the veterinary certificate I mail you upon receipt of the purchase price reveals any other, your money will be refunded * * * "

The evidence tends to show that relying on the advertisement referred to appellee bid \$180 cash on the colt called "The Circulation;" that the bid was accepted by appellant by letter written January 27, 1916.

(Page 1)

which was received by appellee January 29, 1916; that on that date appellee mailed a draft to appellant for \$180 the amount of the bid; that after the receipt of the draft and on Monday, January 31, 1916, appellant wrote to appellee saying that the colt had been knocked down to him and passed to him as sound and in good health, but that on Sunday, January 30, 1916, "some of my colts turned up with signes of old fashioned colt distemper. As a result, we have every one of them up in stalls and several of them today, including "The Circulation," have little abcesses under their throats. * * * Dr. Whipple tells me the dis-

temper is very severe around here this year * * * P. S. Dr. Whipple says he has been so busy he neglected to send certificate, but over the phone yesterday promised to send at once."

A certificate signed by Dr. Whipple finally came and was dated January 26, 1916. The evidence does not show when it was in fact made or sent to appellant or by him to appellee although the Dr. does say it was made as a result of an examination made on January 26, 1916, which it will be observed was the day before the colt was sold to appellee. No certificate signed by any veterinary on the day the colt was sold is shown in this record.

The evidence strongly tends to prove, and the jury evidently believed, that the colt was infected with distemper and was not in fact sound and in good health on the day he was sold. ~~He died from distemper shortly after he was paid for by appellee.~~ Suit was brought by appellee to recover the purchase price paid for the colt.

The jury found the issues for the plaintiff and assessed his damage at \$180. Judgment was entered on the verdict.

The statement in the advertisement that the horse was "sound"

(Page 2)

constituted a warranty and not a mere representation. **Robinson v. Harvey** 82 Ill. 58. **Reed v. Hastings** 61 Ill. 266, **Forster, Waterberry & Co. v. Peer** 120 Ill. App. 199.

The letter of appellant dated January 31, 1916, in which he says the veterinary examined the colt when he was "knocked" "down" to appellee and "passed him as sound and in good health" tends to show that appellant understood that he was selling him under a warrant that he was sound and in good health. The further fact that appellant advertised to return the money paid for any horse who was shown by certificate of the veterinary to have any other unsoundness or blemish than that pointed out by the owner before the sale was itself undoubtedly intended to be understood as a warranty that every horse sold as sound was in fact sound, and must have been so understood and should be so construed. The colt here in question was sold as sound.

A horse at the time he is sold is affected with the disease of distemper is not sound. **Kenner v. Harding** 85 Ill. 264. **McCann v. Uiman**, 109 Wisc. 574.

There were at least three erroneous instructions given for appellee, but the verdict is so manifestly right on the facts, that we do not feel justified in reversing the judgment for errors in instructions.

Finding no reversible error in this record the judgment is affirmed.

3193

206 I.A. 538

Gen. No. 6647.

October
~~April~~ Term 1916

Ag. 4.

CHILDERS & LILLIENSTEIN, (A Corporation),

Appellant.

vs.

ILLINOIS CENTRAL R. R. CO.

Appellee.

Appeal from Sangamon

Opinion by Thompson, J.

*renewed not waived
S.K.-Jec*

This suit is between the same parties, was begun at the same time, before the same Justice of the Peace, was appealed to the Circuit Court and there tried before the same jury and at the same time with cases number 6646, 6660 and 6661, now pending in this court. The cases are all submitted on the same bill of exceptions. In this case a verdict was returned in the Circuit Court in favor of the plaintiff for \$120, on which judgment was rendered.

d

Appellee seeks to recover for the death of a mule shipped from Benton, Illinois, to Springfield, February 16, 1915. The evidence shows that one Saunders of Benton, telephoned Eli Lillienstein that he had some mules for sale. Lillienstein, who had not seen the mules before, went to Benton and bought twenty-five, which were shipped that forenoon. When they arrived at Springfield, one of the mules was sick and died three days later of pneumonia. The contention of appellee is that there is no evidence that the mule did not have pneumonia when it was shipped or that it contracted the disease while in the possession of appellant.

The mules were shipped under a uniform limited liability live

Page 1

apl

stock contract signed by an agent of appellee and introduced in evidence by it. The contract is similar to that under which the shipment in case No. 6646 was made. The notice required by the contract was not given but appellee argues that the requirement concerning the giving of notice was waived.

The bill of exceptions contains no evidence tending to show any waiver. The record contains certain correspondence certified to the Circuit Court by the justice of the peace, but this correspondence is not referred to in the bill of exceptions, and there is nothing in the bill of exceptions tending to show it was introduced in

< evidence in the trial in the Circuit Court. Evidence not preserved in the bill of exceptions may not be considered by the Appellate Court. Seidschlag vs. Town of Antioch, 109 Ill. App. 291. What was said in reference to the failure to give notice in No. 6646, applies to this case. The judgment is reversed with a finding of fact that no notice was filed within ten days as required by the shipping contract.)

Reversed.

3184

206 I.A. 539

Gen. No. 6660.

October
~~April~~ Term 1916

Ag. 6.

CHILDERS & LILLIENSTEIN, (A Corporation),

Appellant.

vs.

ILLINOIS CENTRAL R. R. CO.

Appellee.

Appeal from Sangamon

Opinion by Thompson, J.

This is one of the series of cases referred to in No. 6647. In this case the verdict and judgment in the Circuit Court were in favor of the defendant.

Appellant brought suit to recover from appellee damages for an injury to a mare shipped July 2, 1915, with other mares and mules from Bloomington to East St. Louis with the privilege to stop at Springfield to finish loading. The contention of appellant is that the mare was injured on the hip by some projection in the car. As in No. 6646, the evidence does not show when the mare was injured but the evidence on that question is that the mare had an injury to her hip and the first time the injury was seen was in the barn of the consignee.

The mare was shipped under a limited liability live stock contract signed by an agent of appellee similar to the contracts under which the shipment in 6646 and 6647 were made. The notice required by the contract was not given but the argument of appellant is that the giving of the notice was waived. It is contended in this case

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that there is no evidence that appellant had knowledge of the provision of the contract. Appellant offered the contract in evidence signed by it, by its agent Childers. It neither offered evidence nor made any contention in the trial court that it did not have full knowledge what it was signing.

The first instruction given at the request of appellant told the jury that if it believed from the evidence that the defendant entered into a contract to safely carry the horses of plaintiff "and negligently failed to deliver said horses safely and that the plaintiff complied with all the conditions of said shipping contract on its part," then it should find the issue for plaintiff. Another instruction of the same purport was given at appellant's request. It now complains of instructions given at the request of appellee informing the

jury that before appellant can recover it must believe from the evidence that it had complied with the contract by giving the required notice. Appellant may not complain of instructions announcing the same propositions that were requested and given at its instance. There is no error in the instructions and the judgment is affirmed.

Affirmed.

THE
LIBRARY OF THE
MUSEUM OF NATURAL HISTORY
AND
ZOOLOGY
OF THE
CITY OF LONDON
1881

Gen. No. 6661.

Circuit
~~April~~ Term 1916

Ag. 7.

CHILDERS & LILLIENSTEIN, (A Corporation),

Appellant.

vs.

ILLINOIS CENTRAL R. R. CO.

Appellee.

206 I.A. 540

Appeal from Sangamon

Opinion by Thompson, J.

This is one of the series of cases referred to in No. 6647. In this case the verdict and judgment in the Circuit Court were in favor of the defendant.

In this case appellant brought suit to recover, from appellee, damages for an injury to a mare shipped June 24, 1915, with other horses and mules from Blomington to East St. Louis, with the privilege to stop at Springfield to finish loading. The evidence shows that when the horses were being loaded into a car at Bloomington, the mare, for which damages are claimed, broke through the floor of the chute which was in bad condition, with one hind leg and a large sliver was driven into her leg above the hoof, permanently crippling her. Childers, one of the stockholders, who is the principal buyer for appellant, verbally notified the agent of appellee at East St. Louis and at Blomington, of the injury. That is the only evidence of notice of the injury. The contract, under which the mare was shipped, was similar to the contracts under which the other shipments were made. There was no attempt to comply with the requirements of the shipping contract and there is no evidence in

Page 1

the bill of exceptions of any waiver of the notice. There is in the record correspondence between the parties certified by the Justice of the Peace to the Circuit Court, but it does not appear to have been offered in evidence in the Circuit Court. What was said in cases numbered 6646 and 6660 applies to this case and no useful purpose would be served by repetition. The judgment will be affirmed.

Affirmed.

Gen. No. 6692.

April Term 1917.

Ag. 15

LOLA HESTER, Defendant in Error.

vs.

FRED HESTER, Plaintiff in Error.

Error to Vermilion.

Opinion by Thompson, J.

Lola Hester filed a bill to the May Term 1913 of the Circuit Court of Vermilion county against her husband, Fred Hester, for a divorce on the ground of extreme and repeated cruelty. The bill alleges that complainant is and had been for more than fifteen years past a resident of Vermilion county, Illinois, and that the defendant had been guilty of extreme and repeated cruelty towards the complainant and specifically alleges "that on November 1, 1909, the defendant struck her a violent blow on the head with his fist without any provocation whatever; that on or about November 15, 1910, defendant struck and slapped complainant with his hand and dragged her from her bed, that during the month of November 1910, he otherwise cruelly treated complainant" and used towards her obscene, profane and opprobrious language so that she was compelled to cease living with him; that a child Evelyn was born to them, now four years of age and for the past two years defendant has failed to furnish complainant and their child proper support and maintenance and that he is not a fit person to have the care and custody of said child. The summons issued to the May Term was returned "defendant not found." An alias summons

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to the October Term was served on the defendant and he filed an answer to which a replication was filed. The case was heard at the October Term without a jury, and on December 13, 1913, the court made an order granting a decree of divorce on the ground of extreme and repeated cruelty and directing the payment of \$100 alimony annually in quarterly payments of \$25, the first payment to be made January 1st next, and awarding the custody of the child to complainant. The decree however appears not to have been filed until December 30, 1913. It recites that the court heard documentary and oral evidence of witnesses examined in open court and findings of all necessary jurisdictional facts as to the residence

and jurisdiction of the parties, and that the parties were married and lived together "until November 13, 1910, when complainant was forced to leave defendant on account of extreme and repeated cruelty, the court herein finding that the defendant was guilty of extreme and repeated cruelty as alleged in the bill of complaint;" and "that the allegations of complainant's bill are true." It also finds that defendant is not a fit person to have the care and custody of the child Evelyn.

It then finds that complainant is entitled to a decree of Divorce on the ground of extreme and repeated cruelty and adjudges that a divorce is granted, and that complainant have the care and custody of the child without any interference on the part of the

Page 2

defendant

until further order of the court and orders that alimony be paid as heretofore stated until the further order of the court.

During the May Term, 1915, on September 11, Lola Hester filed a petition for a rule on the defendant to show cause why he should not be adjudged in contempt of court for failing to pay alimony, and a writ of attachment was issued for the defendant returnable September 20. Nothing further is shown by the record until sometime during the May Term 1916, when Fred Hester, by his solicitor, made a motion to quash the writ of attachment and to vacate the order granting alimony for the reason that the said decree is insufficient and not binding on your said defendant in that there has been preserved no certificate of evidence and there is no specific finding of fact which would warrant the relief prayed for. The foregoing is all that is shown by the record and the motion to quash is still pending.

On December 14, 1916, three years and a day after the trial court announced its decision, the defendant Fred Hester sued out a writ of error, and assigns for error (1) that the decree of divorce is void because it contains no finding of facts showing extreme and repeated cruelty and is not supported by a certificate of evidence; (2) that the court erred in granting a writ of attachment on a void decree, and (3) that the court erred in awarding alimony and in awarding the custody of the child to complainant without the necessary finding of facts.

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The only question presented for review is whether the decree can be sustained without the evidence having been preserved by a certificate of evidence. The plaintiff in error has cited two cases, *Ohman vs. Ohman*, 233 Ill. 632; and *Trenchard vs. Trenchard*, 245 Ill. 313, which appear to be decisive of the question. These cases were suits for divorce, heard on bill, answer, replication and evidence in open court, wherein decree had been granted on the ground of extreme and repeated cruelty. In the *Ohman* case it is said, "The evidence was not preserved in the record and the only finding of the decree is that the allegations in the said bill contained are true as therein stated and the equities of this cause are with the complainant."

"In chancery it is incumbent upon the party in whose favor a decree granting relief is entered to preserve in the record the evidence justifying the decree. Contrary to the rule of law, no presumption will be indulged that evidence sufficient to sustain the decree was heard if such evidence does not appear in the record. The general finding that all the material allegations are proved and that the equities of the case are with the complainant will not sustain a decree granting relief where there is no finding of specific facts and the evidence is not preserved in the record." The decree was reversed.

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In the *Trenchard* case, the decree recited a finding "that the defendant has been guilty of extreme and repeated cruelty as charged in complainants bill of complaint." The opinion first states "we are of the opinion the bill does not state a case of extreme and repeated cruelty within the meaning of our statute." Two acts of physical cruelty were alleged in the bill in detail, and are charged to be extreme and repeated cruelty. Other acts of cruelty are also alleged, one of which was sending complainant away from home just before the birth of a child, because her presence embarrassed the daughter of defendant by a former marriage. The opinion states that there is no certificate of evidence in the record from which the character of the acts complained of as extreme and repeated cruelty can be determined. "The recital that plaintiff in error had been guilty of extreme and repeated cruelty as charged in complainants bill is wholly insufficient as a finding of facts under the allegation of the bill to sustain the de-

cree. * * * It has been repeatedly held that a decree in chancery granting affirmative relief must be supported by evidence preserved by a certificate of evidence or a finding of facts in the decree itself. * * * On the record before us * * * the decree of the Circuit Court cannot be sustained."

In the Trenchard case the allegations of the bill and the findings in the decree were substantially the same as in the case now before us. The court there having held that the decree could not be

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sustained without a certificate of evidence, this decree must be reversed and the cause remanded.

Reversed and Remanded.

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3187

Gen. No. 6695.

April Term 1917.

Ag. 18.

PEOPLE OF THE STATE OF ILLINOIS,

Defendants in Error.

vs.

TILLMAN PHILLIPS, Plaintiff in Error.

206 I.A. 542

Error to Champaign.

Opinion by Thompson, J.

An indictment containing eight counts was returned by the grand jury of Champaign county charging Tillman Phillips with the sale of intoxicating liquor in anti-saloon territory. The defendant pleaded not guilty and on a trial a jury returned a verdict finding the defendant guilty on each count. The defendant was sentenced to fifteen days imprisonment in jail on each count, the time of confinement on the second count to begin at the expiration of the time of confinement on the first count, etc. and to pay a fine of fifty dollars on each count. The defendant prosecutes this writ of error to review that judgment.

The plaintiff in error had a second hand store at No. 113 North Market Street in the City of Champaign. There is a basement, partitioned into smaller rooms with seats in them, under the room in which plaintiff in error conducts the second hand store, with a stairway from the second hand store to the basement, and an entrance to the basement from the rear of the building. It was stipulated

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that the town of Champaign, in which the building was situated, is and was anti-saloon territory during the time covered by the indictment.

It is insisted on behalf of plaintiff in error that the court erred in permitting three witnesses to be examined on behalf of the people, whose names were not endorsed on the back of the indictment. That was a matter in the discretion of the trial court and was not error. (Gore vs. The People, 162 Ill. 259; People vs. Steinhauer, 243 Ill. 46.) Moreover the abstract does not show any objection to any of the three witnesses testifying, and the court granted a postponement, after the evidence for the state had been closed in the forenoon, to 2:30 P. M. on the request of defendant in order that witnesses desired by him might be subpoenaed.

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It is also contended that the evidence does not su-

tain the verdict and judgment. A certificate of an internal revenue special tax stamp to T. H. Phillips and W. G. Mullin as retail liquor dealers at 113 N. Market Street, Champaign, was introduced in evidence without objection, with evidence that Phillips was in and about the basement and that he sold liquor in the basement at different times to different parties. The evidence is ample to sustain the judgment.

It is also contended that the court erred in giving instructions requested by the people. Thirteen instructions were given at

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the request of the people and ten at the request of the defendant. Only eight of the instructions given for the people are in the abstract, and it contains none of those given for the defendant. The instructions are given as a series and are not the instructions of the parties and should all be shown in the abstract.

It is stated that two of the people's instructions are erroneous because they do not tell the jury that it may find the defendant guilty on one count and not on all the counts. In another instruction the jury are informed that "if you believe from the evidence beyond a reasonable doubt that the defendant has sold intoxicating liquor in anti-saloon territory, then for each sale so made if proved beyond a reasonable doubt the defendant would be liable and you should find the defendant guilty on as many counts as you believe beyond a reasonable doubt from the evidence in the case sales were made." The instruction as to the form of the verdict, if the jury should find the defendant guilty, also requested the jury to name the particular counts under which they found him guilty. The jury were fully instructed in the particular complained of, and the jury could not be misled by the instructions given.

The eleventh instruction for the people told the jury that,—"The Statutes of the State provides that the issuance of an Internal Revenue Special Tax Stamp or Receipt by the United States to any

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person as a wholesale or retail dealer in liquors at any place within the territory which, at the time of the issuance thereof is anti-saloon territory shall be prima facie evidence of the sale of intoxicating liquor by such person at such

place or at any place of business of such person within such territory where such stamp or receipt is posted and at the time charged in any suit or prosecution under the anti-saloon act; provided, such time is within the life of such stamp or receipt." Instruction twelve is:—"The court instructs the jury that prima facie evidence is evidence sufficient to establish a fact unless that evidence is rebutted." Counsel state they do not object to number eleven but that they do to "number twelve when taken with instruction eleven because it singles out testimony as defined in twelve." Eleven is a copy of the statutes and twelve is a definition of prima facie evidence. There is no error in the instruction.

There is no error in the case, and the judgment is affirmed.

Affirmed.

Gen. No. 6713.

April Term 1917.

Ag. 36.

DELLA ROBINSON, Guardian of Oather Smith,

Plaintiff in Error.

vs.

206 I.A. 556

W. D. SMITH, FRANK L. OSBORNE AND F. J. TRIMBLE

Defendants in Error.

Error to Coles.

Opinion by Thompson, J.

In April, 1905, Oather Smith was about three years old. There was due her at that time from the estate of her mother, Minnie Smith, of which Frank L. Osborne was the administrator, the sum of \$780. W. D. Smith, her father, was appointed her guardian and his bond as such guardian was signed by Frank L. Osborne and Will C. Trimble. W. D. Smith loaned the money of his daughter to Frank L. Osborne taking his note therefor bearing interest at 6 per cent per annum with personal security. On June 16, 1916, the guardian filed a report showing \$1298.01 on hand belonging to the ward, the same being the principal sum with annual interest at 6 per cent to that date. On the same day he resigned as guardian and B. F. Kelley was appointed guardian. The report was approved by the County Court, and the money of the ward was paid over to the new guardian. W. D. Smith was then discharged as guardian. Subsequently the ward selected Della Robinson, a sister of the mother of the ward, to be the guardian of her estate.

Della Robinson, guardian, filed this bill in equity against Smith and his surety Osborne and F. J. Trimble, who is the only heir

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of Will C. Trimble, the other surety who is deceased, and who as such heir received personal property from his father's estate, for an accounting, claiming that if the interest had been collected annually by the father of the ward, while he was guardian and reloaned, the ward would, from the compound interest, have had \$180 more at the time Smith was discharged.

The case was heard before the court and a decree entered dismissing the bill for want of equity. The present guardian prosecutes this writ of error to review that decree. No objection or assignment of error

raises any question over the way in which the case was heard. The evidence shows that Smith had paid \$275 to Della Robinson for the support of his daughter from 1906 to 1909; that he had paid out \$180 for clothing for her to the time of his discharge, \$35 for music, and the costs and attorneys fees in the guardianship matter. All these payments were made from his own means and he has never charged anything for guardian's compensation or commission.

The estate has netted six per cent annually and has not sustained any loss or been at any expense. If the guardian had charged the usual commissions and expenses the estate might not have been nearly as well off as it is at present. This father, as guardian, paid all the expenses of the estate and of his daughter from his own funds although he is a tenant farmer and had but little means.

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The present guardian is not acting in the interest of the ward in the prosecution of this suit. Neither fraud nor error appears in the report of the guardian, which was approved by the County Court after the new guardian had been appointed. The guardian, from the evidence, left the money with Osborne until the time he resigned. The Statutes, Sec. 22, Chapter 64, provides how a guardian shall loan the money of his ward. The Statutes was not followed but the money was forthcoming and there was no loss or expense to the ward. The guardian did not use the money of his daughter, it was not in his hands at any time and under the circumstances surrounding this case we see no reason for the filing of this bill. The decree will be affirmed and the costs of this writ of error will be taxes against the present guardian personally.

Decree affirmed.

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3194
Gen. No. 6727.

April Term 1917.

Ag. 48.

JOSEPH WALLACE, Appellee,

C. E. LAWSON, JAMES JENKINS and WILLIAM

SMITH, Appellants.

Appeal from County Court

of Coles County.

206 I.A. 573

Opinion by Thompson, J.

Joseph Wallace brought suit before a police magistrate in replevin to recover a consignment of whiskey claimed to have been wrongfully taken by the defendants. The property sought to be replevied could not be found by the officers who served the writ on the defendants. On the trial judgment was rendered, Aug. 8, 1916, against the defendants for \$108.90. An appeal was prayed for to the County Court by the defendants. The magistrate fixed the amount of the bond at \$150. A bond in the amount fixed by the magistrate was executed by the defendants with a surety and approved by the magistrate August 18, 1916.

The appeal was perfected to the County Court. The law term of the County Court convened February 5, 1917. The record shows that on that day the "defendants" made a motion to dismiss the appeal. The motion was allowed and "appeal dismissed at appellants costs." The defendants prayed and have perfected an appeal to this court.

The bill of exceptions recites that after the parties had announced themselves ready for trial, and after the examination of the jury had begun, "counsel for appellee entered a motion to dismiss the

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cause" for insufficiency of the appeal bond and the motion was "granted." If the record is correct then the appellants in this court have appealed from the allowance of a motion made by themselves, and if the bill of exceptions is correct then they have appealed from a motion by which the suit was dismissed.

The judgment before the magistrate was for \$108.90. The bond should have been fixed at double the amount of the judgment and costs. The Justices' Act directs that an appeal from a justice shall not be dismissed for any informality in the bond and the court shall allow a party to amend the bond within a reasonable time so that a trial

may be had on the merits of the case. The Constitution provides that the jurisdiction of Justices of the Peace and Police Magistrates shall be uniform and Section 115 of the Justices' Act applies to both Justices of the Peace and Police Magistrates. The Police Magistrate fixed the amount of the bond and appellants gave the bond which was approved by the justice. The appellants should not be prejudiced by any informality or deficiency in the bond if they will, when objection is made, remedy the defect.

"The proper practice is after the bond is adjudged insufficient to enter a rule against the appellant that unless he executes and files a sufficient bond a day to be named the appeal will be dismissed." *Wear vs. Killeen*, 38 Ill. 259; *Town of Partridge vs. Snyder*, 78 Ill.

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519; *Enright vs. Rehbach*, 133 Ill. App. 50; *City of Sullivan vs. Henry* (Opinion filed April 16, 1917, 3rd District.) It was error to dismiss the appeal without entering a rule on the appellants to give a good and sufficient bond within a time fixed by the court.

It is also contended that the bill of exceptions does not show an exception to the order dismissing the appeal. No exception is necessary. *Miller vs. Anderson*, 267 Ill. 608; *Britton vs. Davis*, 273 Ill. 31.

The judgment is reversed and the cause remanded.
Reversed and Remanded.

Page 3

W. J. SICKAFUS, Appellant,

vs.

WALDO VICKREY, Appellee.

Appeal from Moultrie.

Opinion by Thompson, J.

W. J. Sickfaus began this suit before a justice of the peace against Waldo Vickrey to recover \$100 claimed to be due him as a commission on a real estate trade. The case was tried by a jury in the justice court and a verdict returned and judgment rendered in favor of defendant. Plaintiff appealed to the Circuit Court where a jury again returned a verdict in favor of defendant on which judgment was rendered. Plaintiff appeals to this court.

The evidence shows that appellant was a real estate agent in the city of Sullivan. Waldo Vickrey owned a farm of 110 acres in Greene County, Indiana, and was engaged in the poultry business in the city of Sullivan. Jason Sullivan owned some real estate in the city of Sullivan. Appellant claims to have negotiated a trade of the appellee's farm in Indiana for the Sullivan property of Jason Sullivan. He testified that appellee agreed to pay him a commission of \$100 if appellant would make the trade of the farm for property in Sullivan. A trade was made of the Greene county farm for the property in Sullivan owned by Jason Sullivan. The evidence of appellant shows that Jason Sullivan, who is a relative of his by marriage, had

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listed his property with appellant for sale or trade, about a year and a half before the making of the trade for which appellant seeks to recover a commission. The agency for the sale of the Sullivan property had never been taken away from the appellant although appellant claims the agency was only for a limited time. Appellant testified that appellee gave him the agency to trade his farm and agreed to pay him \$100, if he would secure a trade. Appellee testified that he never listed his farm with appellant and never agreed to pay him any commission; that appellant came to him and tried to sell him property and that appellee said he had a farm in Indiana and appellant suggested that maybe he could trade the Sulli-

van property for the farm. The evidence also shows that Sullivan said he expected to pay appellant a commission for the trade. The evidence tends to show that appellant was trying to act as the agent of both parties.

After appellant had testified to an express contract he offered evidence of what would be the reasonable and customary commission for making the trade. Such evidence was merely argumentative when offered of the reasonableness of his charge and not proper at that time. After the appellee had denied making a contract the evidence might under some circumstances be proper but when offered the objection was properly sustained.

We have carefully reviewed the criticisms made by counsel con-

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cerning the given and refused instructions. We find no error in any of the matters of which complaint is made and the jury were fully and fairly instructed.

The issue of fact was one peculiarly within the province of a jury to decide and the verdict is sustained by the evidence. There is no error of law in the case. The judgment is affirmed.

Affirmed.

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Gen. No. 6513. April Term, A. D. 1916. Agn. 18.

EMMA J. RICKLY, Executrix of the last will of
GEORGE C. RICKLY, deceased. Appellee.

vs.

PARLIN & ORENDORFF CO.

Appellant.

206 I.A. 599

Appeal from City Court. City of Canton.

ELDREDGE, J.

Appellee filed her amended bill for discovery against appellant to which amended bill the latter demurred and from the judgment of the court overruling the demurrer and ordering an answer to be filed this appeal is prosecuted. When discovery is the only relief sought in a bill a decreetal order overruling a demurrer and ordering an answer is final and appealable. Robson vs. Doyle, 191, Ill. 566; Grimes vs. Hillery, 38 Ill. Ap. 246.

It is averred in the amended bill that George C. Rickly in his lifetime was possessed of and in the exclusive control of all patents and exclusive right to manufacture and market a certain machine known as the Campbell Sub-Surface Packer; that said packer is a valuable machine for packing the soil beneath the surface after it has been plowed, and is made in the following sizes: 10, 16, 20, 24 and 36 wheels each; that on December 23, 1908 said Rickly entered into a contract with appellant in which he granted

Page 1

the exclusive right to manufacture said packers to appellant, and in consideration for the above exclusive right, appellant agreed to pay to said Rickly a royalty of twenty-five cents per wheel for 10 wheel machines and twenty cents per wheel for 16, 20 and 24 wheel machines, during the life of the patents; that appellant manufactured said packers until about December 29, 1911 when said contract was modified by agreement of the parties thereto, in that said Rickly was to make a discount of 10 per cent from the above named royalty prices for all said packers said appellant should manufacture from January 1, 1912 until the expiration of said patents which was August 27, 1912; that said Rickly preformed his part of said contract but that said appellant has failed and refuses to preform its part of the contract in that it refused to pay to said Rickly during his lifetime and has refused and continues to refuse to pay to appellee, as executrix, the royalties as provided in said contract; that appellee, as executrix of the estate of said George C. Rickly, decess-

ed, has filed her suit at law against appellant in the City Court of Canton to recover from it the royalties due and unpaid; that she is informed and believes that appellant is a large manufacturing corporation with a voluminous and complex system of book-keeping, and that she has no way of knowing whether the information hereinafter asked for in this bill of discovery

Page 2

was kept in appellant's regular system of book-keeping or in some secret method for the purpose of defeating the aforesaid royalties; that during the period from December 23, 1908 to August 27, 1912, appellee is informed and believes appellant manufactured and sold a large number of said packers throughout the United States and foreign countries and that appellant made and had in its possession and in the possession of its agents throughout this country and foreign countries a large number of said packers manufactured during the period covered by the above contract which it had not sold at the time of the expiration of said patents; that said Geo. C. Rickly in his lifetime was unable to get a statement from appellant showing the number and kind of packers manufactured by it during the period covered by the contract, or any part thereof, though often requested for the same, and that appellee has been unable to get a statement from it showing the number and kind of said packers manufactured by it during the period covered by said contract or any part of said period; that the facts and information asked for in this bill are well known to the defendant herein and to U. G. Orendorff, its secretary and treasurer, and said facts and information are in its and his exclusive possession; that appellee as executrix of the estate of said George C. Rickly, deceased, has a good and meritorious course of action against appellant in her suit at

Page 3

law but she will be unable to prove her claims, unless she is given the discovery hereinafter asked as she has no other way of finding out or being able to prove how many of said packers were made and manufactured by appellant during the period covered by said contract than by the discovery hereinafter asked; that it is material and essential in her said suit at law that she have the evidence herein asked to enable her to prove the number of said packer wheels made during the life of

said contract and without such evidence she cannot prove her said case at law; that said Orendorff is secretary and treasurer of said appellant, the defendant in said suit at law, and has full knowledge of the information asked for in said discovery and that she has no other source by which to get said evidence than from said appellant by this bill as aforesaid.

The bill concludes with the prayer that said Orendorff, secretary and treasurer of appellant be directed to answer certain interrogatories therein set out seeking the information requested.

The amended bill is not subject to the criticism that it should contain all the facts tending to support appellee's claim in her suit at law. When a bill is filed purely for discovery in aid of a suit at law, it is sufficient if it is averred therein that the evidence sought will aid the complainant in the suit at law. Robson vs.

Page 4

Doyle 191, Ill. 566.

J. + A. 9 552.

It is urged that section 9, chapter 51 R. S. providing for the production of books and writings containing evidence pertinent to the issue in any action at law has in effect abrogated the jurisdiction of a court of equity to grant relief by way of bills for discovery. The above mentioned section has no such effect. Garden City Sand Co. vs. People 118, Ill., Ap. 372. This section simply gives to a party to a suit at law additional means of procuring evidence tending to prove the issue presented by him and in the possession of the adverse party and has no tendency to curtail the jurisdiction of a court of equity to entertain a bill for discovery in a proper case. The bill in the case of bar avers that appellant is a large manufacturing corporation with a voluminous and complex system of book-keeping and that appellee has no way of knowing whether the information sought was kept in appellant's regular system of book-keeping or by some other method. The bill in effect charges that appellant is the only one having any knowledge of the accounts in question which are all on one side and about which appellant alone can furnish accurate information. Under these circumstances a court of equity has jurisdiction to order a discovery. Miller vs. Russell 224 Ill. 68.

The decree of the City Court is affirmed.

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Gen. No. 6516.

April Term A. D. 1916.

Ag. 21.

CITY OF SPRINGFIELD, Appellee.

vs.

INTER-STATE INDEPENDENT TELEPHONE AND

TELEGRAPH COMPANY, Appellant.

Appeal from Circuit Court

Sangamon County.

206 I.A. 601

ELDREDGE, J

This is an action in debt brought by the City of Springfield, appellee, against the Interstate Independent Telephone and Telegraph Company, appellant, to recover compensation for rentals alleged to be due for the occupation of portions of the streets and alleys of the city of Springfield during the years 1909 to 1913 inclusive, by poles owned by the defendant. The cause of action is based upon an ordinance alleged to have been passed, August 5, 1901, re-enacted on January 6, 1908, and amended December 27, 1910. The ordinance provides that any person, firm or corporation, owning, controlling or occupying any post or pole over 8 feet high, occupying any portion of any street, alley or sidewalk, used to support electric or other wires, awnings or displays for the purpose of advertising, shall pay annually into the city treasury, the sum of one dollar for each such pole or post, as a remuneration to the

Page 1

city for the use of the portion or portions of the street, alley or sidewalk so occupied. It is conceded that during this period of time appellant maintained 2600 poles on the streets and alleys of the city. To the declaration appellant filed the general issue and three special pleas. A demurrer was sustained to the first special plea and replications were filed to the second and third special pleas. Appellant filed demurrers to the replications which demurrers were overruled by the trial court. Upon the trial the jury found the issues for appellee and fixed the damages at \$13,000. Judgment was entered upon the verdict to reverse which this appeal is prosecuted.

The fundamental issues in this case are identical with those in the case of the City of Springfield vs. Interstate Independent Telephone and Telegraph Co. 201 Ill. App. 227, with the exception that in that case the suit was brought to recover rentals for the year 1914, instead of for the years mentioned in this case. The opinion of this court rendered in the former case must be considered as **res ad judicata** of the same questions involved in this case, and the judgment is therefor reversed.

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206/621

Filed June 11, 1917

387 - 22821

PATRICK MCCORMICK,
Appellee,

vs.

CHICAGO CITY RAILWAY COMPANY,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

30 I.A. 321

MR. PRESIDING JUSTICE ROSSNEY
DELIVERED THE OPINION OF THE COURT.

Plaintiff, in a fourth class tort action in the Municipal Court, had judgment for \$150 against the defendant, to reverse which this appeal is prosecuted.

On the 10th of July, 1913, plaintiff, with his horse, had been engaged in the work of hoisting brick and mortar at a building under construction. About 5 o'clock in the evening he prepared to go home, got on the horse's back and rode west on 47th street, in Chicago. At Indiana avenue, a north and south street, he stopped for cars and other vehicles to pass, and when the crossing was clear he again started west. Plaintiff testified that at a point 111 feet west of the easterly building line of Indiana avenue an automobile stood at the curb on the north side of 47th street; that in order to pass by it he turned out to the left, and was "about half way between the automobile" - abreast of it - when a westbound 47th street car belonging to the defendant came from behind and hit the horse, threw it down, broke the harness and threw him on the street.

Three witnesses besides the plaintiff testified in his behalf; no testimony was introduced for the defendant. Two of the witnesses testified that just before the collision the horse shied toward the track and that the car hit the

horse on the side of the neck, causing it to rear up and throw plaintiff from its back. Plaintiff testified that the last time he looked to see if a car was coming from any direction was when he was over on the east side of Indiana avenue, and that at the time of the collision he thought he was about two feet from the north track.

The evidence clearly shows that the car in question had stopped at the east side of Indiana avenue, a transfer point, and had there taken on and discharged a considerable number of passengers, and that as it proceeded westward the motorman had a clear view of the road ahead. Plaintiff's most favorable witness, a passenger on the front platform of the car, stated that the car crossed Indiana avenue at a rapid rate of speed and that this speed was maintained until after the car struck the horse; that at the time plaintiff turned in towards the track the car was about ten feet away and "the next moment the car struck the horse and knocked him (plaintiff) off"; that the car stopped within about forty feet after the collision. This same witness, however, a few days after the accident signed a statement in which it appeared that the car stopped "in about two or three feet after it slid into the horse."

Whether we adopt the theory that the horse shied onto the track, or that of the plaintiff, as shown by his testimony, that the car struck the horse as it was walking normally alongside the track, there is nothing in the record to establish the charge of negligence on the part of the defendant. There is no evidence that there was not room for plaintiff to pass safely between the automobile and the track without getting into the path of the car, and plaintiff's own testimony would indicate that there was sufficient space

for him to do so. We are of the opinion that the greater weight of the evidence shows that the motorman was operating his car in a manner consistent with the circumstances, and that the accident was the result of the plaintiff permitting his horse to move in the way of the approaching car at a time when it was impossible for the motorman to avoid striking it. In this the plaintiff was guilty of negligence which was the proximate cause of the accident.

The motorman was not required to anticipate or to guard against anything not reasonably to be expected; nor need he have been constantly on guard against unusual or extraordinary occurrences or conduct on the part of others. The rule is that a street railway company "is required to exercise ordinary care, to be measured by the apparent situation and the dangers naturally incident to the business. * * * where the alleged negligence consisted of an omission of duty suddenly and unexpectedly arising, it is incumbent upon the plaintiff to show that the circumstances were such that the servants of the defendant had an opportunity to become conscious of the facts giving rise to the duty, and a reasonable opportunity to perform it." Booth on Street Railways, 2nd Ed., sec. 305; E. H. T. Co. v. Browdy, 206 Ill. 615; W. G. St. R. R. Co. v. Schwartz, 93 Ill. App. 307. See, also, Saba v. A. T. & C. R. Co., 183 Ill. App. 34, and Hall v. F. St. L. & M. Ry. Co., 188 Ill. App. 350. Many other cases in support of this principle might be cited.

Other points are presented as grounds for reversal, but in view of our conclusion as above expressed it is unnecessary to pass upon them.

For the reasons indicated the judgment is reversed with a finding of fact.

REVERSED.

The court finds that the defendant, in the operation and management of its car, was not guilty of negligence causing the injuries to plaintiff alleged in his statement of claim herein, but that plaintiff was guilty of negligence proximately contributing to the accident in which such injuries were sustained.

NICHOLAS FLEIMLING,
Appellee,

vs.

PERRY PIPE COMPANY and
JOHN R. PERRY,
Appellants.

APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

206 I.A. 623

MR. PRESIDING JUSTICE McSURELY

DELIVERED THE OPINION OF THE COURT.

This is an appeal by the Perry Pipe Company and John R. Perry, hereinafter called defendants, from a decree entered upon the recommendation of a master in chancery who had been ordered to make an accounting between the parties.

Complainant by his bill alleged that on January 9, 1914, the Pipe Company was indebted to him in the sum of \$6,067.84; that it had no money but had assets which could have been subjected to this payment; that John R. Perry, who was then the president and manager of the company and the owner of a majority of its stock, induced the complainant, in order to save the company, to enter into a contract by which complainant was to accept pipes at the regular wholesale price for the indebtedness due him, upon conditions and provisions named in a contract entered into in pursuance of this agreement; that such contract was made, setting out the indebtedness and the undertaking of the Pipe Company to turn over to the complainant a large stock of their finished product, to be kept in the company's building without expense to complainant, and to fill from this stock all orders for goods received from the states of Michigan, Ohio and Indiana, and to make collections on the same and deposit all moneys received in the name of the complainant, opening a book of ac-

count in his name in which to record all said transactions; the company was to give complainant a statement of all goods billed out and moneys received on the first of each month thereafter; that if any orders should be received from this territory which could not be filled out of said stock of goods which had been sold to complainant, then the company agreed to fill such orders and make an exchange with complainant for a like quantity of the said goods which had been accepted by the complainant as payment of the indebtedness due him. It was specifically agreed that complainant had the exclusive right to sell the product of the company in Indiana, Michigan and Ohio. The contract also included an obligation signed by the defendant John R. Perry, in which he stated that he was the majority stockholder of the corporation and believed that the contract was an advantageous one for the company, and because of his interest and because he had induced the complainant to enter into the contract he personally obligated himself to carry out all of the agreements undertaken by the company in the contract. The complainant alleged that shortly thereafter the defendants breached certain of their undertakings and violated the provisions of the contract in several respects. An answer was filed denying the material allegations of the bill except that the execution of the contract was admitted.

Subsequently the case came on for trial before the chancellor on complainant's amended and supplemental bill and defendants' amended answers thereto, and complainant's replication to the answers, and after hearing evidence and argument a decree was entered by the chancellor on December 24, 1915, finding that the complainant was entitled to the benefit of all orders for goods from every source in the states of Michigan, Indiana and Ohio, and that the defendants

[illegible]

must account to the complainant for all such orders and sales between January 9, 1914, and June 3, 1915, and that the defendants had not given credit to the complainant for such sales or accounted for the same. It was also decreed that the defendants should make a statement of account to the complainant of all the orders received and of all sales made in said territory during said time. There had apparently been an attempt by the defendants to terminate the contract, but the court decreed that such attempted termination was ineffective and void. The court also found by its decree that the defendants had taken certain of the goods belonging to the complainant without payment, and it was decreed that they should account for the same. It was also found that they had taken other goods belonging to the complainant and had substituted certain goods therefor without complainant's consent, and it was ordered that defendants should account for all such goods so taken for which other goods had been substituted. It was also ordered that the matter be referred to William A. Doyle, master in chancery, to make an accounting of such goods.

This decree of December 24, 1915, was not appealed from. The evidence heard by the chancellor upon the trial is not before us in the record. We cannot pass upon the correctness of this decree. In Barnes v. American Brake-Beam Co., 238 Ill. 582, the court said of a similar decree: "A decree which finally settles a controversy and adjusts the rights of the respective parties is final and appealable although questions of accounting remain to be adjusted." This decree construed the contract between the parties and fixed the rights of the respective parties thereto; it was final and appealable as nothing remained except an accounting; there

having been no appeal we shall not question its propriety. This leaves, therefore, as the only matter for our consideration the correctness of the statement of the account made by the master in chancery and incorporated in the decree of July 21, 1916.

The master's statement is lengthy; the various transactions between the parties with reference to sales, the taking of goods and substitution therefor, are set out minutely in detail. No specific error appears to be pointed out by the defendants with respect to the items contained in the accounting. We shall therefore assume its correctness.

Most of the argument of the defendants is directed towards the original decree, but as we have said heretofore this was a final, appealable decree; as it was not appealed from it cannot now be questioned.

Predicated upon the first decree, the accounting made by the master and the decree entered thereon were justified from the evidence, and the propriety of this latter decree only is now before us. As no convincing reason is presented why it should be changed it will be affirmed.

AFFIRMED.

ANDREW KUTLIK,
Defendant in Error,

vs.

THE CHICAGO, ROCK ISLAND AND
PACIFIC RAILWAY COMPANY,
Plaintiff in Error.

ERROR TO SUPERIOR COURT,
COOK COUNTY.

206 I.A. 624

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

Plaintiff, while employed by the defendant, received injuries for which he brought suit, and upon trial had a verdict for \$10,000 upon which judgment was entered. Defendant asks that this be reversed.

Plaintiff in two counts of his declaration alleged that he was negligently ordered to do certain work at an unsuitable and dangerous place and also in an improper and dangerous manner.

From the evidence the jury properly could find that Frank Nixon was employed by the defendant as foreman of its wrecking crew which was composed of six men, including the plaintiff; that when this crew was not engaged in clearing up wrecks on the road they worked in defendant's railroad yard; that at the time in question defendant desired to dismantle a flat car which was standing in its yard east of and immediately alongside a platform or scrap dock several hundred feet long; the top of this dock was about on a level with the top of a flat car, and there was a space between the side of the car and the dock of about eight or nine inches. It was the intention of the workmen to raise the body of this car by means of jacks, off ^{of} its trucks, to shove another flat car under the body, and thus load it onto the other flat car. The body of the car which they

THE CHURCH, 1000 N. 10th St.,
Tulsa, Oklahoma.

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Tulsa, Oklahoma.

were dismantling was made up of two end sills, two side sills which extended the full length of the car, and several other sills, across which boards were nailed; the side sills were mortised into the end sills; truss rods about an inch and a quarter in diameter extended the length of the car from one end sill to the other; these truss rods could be tightened, and thus each end sill was held firmly in place. When the truss rods were removed there was nothing to hold the end sills firmly.

The couplers and the truss rods had been previously removed from the car in question, and on the morning of the accident the foreman, Nixon, ordered one of the gang named Kuniewski, with his helper, the plaintiff, to take their jacks and complete the work of dismantling the car, and specifically ordered them to jack up the car by placing their jacks under the end sills. Although there is much argument in detail as to whether or not the jacks could be used in any other way, we are of the opinion that the jury was warranted in believing that the only way the car could be jacked up ^{at that place} ~~was~~ by putting the jacks under the end sills. Among the reasons for this was the close proximity of the car to the scrap dock, which would prevent the operation of the jacks at the side; also the unevenness of the ground on either side of the track, and also the small surface of the side sills. In obedience to the foreman's order the two men placed the jacks under the end sills and raised the car, under the foreman's observation. While the north end was jacked up and the men were under the car taking off the iron and timbers the north end sill twisted and pulled partially away from the side sills, permitting the north end of the car to fall down upon the men, with the resulting injuries to the plaintiff complained of.

That the foreman, Nixon, gave the order as above

stated does not seem to be controverted. Neither is there any serious question but that the method of raising the car by placing the jacks under the end sills after the iron trusses had been removed was an improper and dangerous method of doing the work.

Upon the trial, under questioning by counsel for the plaintiff, it was developed that plaintiff was acting as a helper to Kuniewski, the other man working on the car, and it is said that this injected a new issue into the case and negatived the allegation in plaintiff's declaration that these two men were fellow-workmen. We do not think there was any variance in this respect. Plaintiff's case was not predicated upon any improper order of Kuniewski but upon the order of Nixon, the foreman; the evidence does not tend to show that the work was done in the manner suggested because of the order of Kuniewski, but was performed in pursuance of the order of Nixon. No negligence of Kuniewski was either alleged or proven.

Did plaintiff assume the risk, and was he guilty of contributory negligence? The rule is that "where the servant is injured while taking the orders of his master to perform work in a dangerous manner the master is liable, unless the danger is so imminent that a man of ordinary prudence would not incur it." Offutt v. Columbian Exposition, 175 Ill. 472. Whether or not the danger of doing the work in the manner ordered by the foreman was so apparent and imminent that the plaintiff in the exercise of ordinary prudence should not have incurred it was a question of fact for the jury to determine. While it is clear that the foreman, Nixon, from his years of experience in work of this kind knew of the danger, yet we are unable to say that the jury should have concluded that plaintiff should have been

equally informed. He was a Slav, raised on a farm, and while he had worked as a member of defendant's wrecking crew for some months prior to the accident, he does not seem to have had any special experience which would apprise him of the danger of this particular method of raising the car. There was evidence that he had only worked in and about dismantling cars for about sixty days altogether, and no evidence that he had ever worked on such a car while standing in close proximity to the scrap dock; and while he may have had more or less familiarity with the general work of dismantling cars, we do not find anything in the evidence which would lead to the inevitable conclusion that he knew from observation or experience of the particular danger of the sills twisting in this specific kind of work. The plaintiff's own statement is that he never saw an end sill twist in this way before.

It was not error to permit testimony as to the relations between Kuniewski and the plaintiff with respect to plaintiff receiving orders from him. In whatever Kuniewski may have said to plaintiff as to how the work was to be done, he was merely repeating the instructions of the foreman, Nixon, and testimony as to this was relevant as tending to show that plaintiff in following such instructions was free from contributory negligence.

Complaint is made of instruction No. 1, which we do not think is justified. The criticism assumes that it was an instruction predicated upon a negligent order of Kuniewski; we do not think it would be so understood. The instruction evidently refers to the authority of Nixon, the foreman. The language of the instruction refers to employees authorized "to take charge and control of a certain class of workmen, in carrying on some particular branch of his busi-

ness." This language applies only to Nixon; Kuniewski was not in charge of a class of workmen or of any branch of the business.

We discern no reasonable ground for reversal, and the judgment is affirmed.

AFFIRMED.

and the other side of the river, the water was very shallow and the current was very strong. The water was very shallow and the current was very strong. The water was very shallow and the current was very strong.

The water was very shallow and the current was very strong.

The water was very shallow and the current was very strong.

The water was very shallow and the current was very strong.

413 - 22847

MORRIS CASTY,
Appellee,

vs.

LANZIT CORRUGATED BOX COMPANY,
a corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

2061A.626

MR. PRESIDING JUSTICE McSURNLY
DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit to recover an amount claimed to be due from the defendant for teaming and hauling goods. Defendant filed an affidavit of defense, with a statement of set-off showing that plaintiff had been overpaid for such services and that there was a balance due the defendant. Upon trial by the court the plaintiff had judgment for \$79.05. Defendant appeals to this court, but plaintiff has not appeared here.

From an examination of the evidence we are of the opinion that the judgment was erroneous and must be reversed. The question involved is simply an accounting between the parties. The plaintiff's books were kept by his son, a boy fifteen years of age, and the evidence is convincing that they were carelessly and inaccurately kept. On the other hand, defendant's books were in proper shape; its payments to plaintiff were proven by checks introduced in evidence. It was abundantly proven that plaintiff's statement failed to show credit items aggregating at least \$125.

The evidence shows that defendant was to pay plaintiff \$22 a week and for extras; that it made payments of \$25 per week, under the belief that this surplus of \$3 took care of the extras. It subsequently developed that the extras did not amount to quite this sum, so that at the time

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suit was commenced defendant had overpaid plaintiff the sum of \$45.95. The defendant was entitled to judgment for this amount on its set-off.

The judgment against the defendant will be reversed and judgment will be entered in this court against the plaintiff in favor of the defendant on its set-off for \$45.95.

REVERSED AND JUDGMENT HERE.

MINNIE E. DONNELLY,
Appellant,

vs.

HUGH B. DONNELLY,
Appellee.

APPEAL FROM SUPERIOR COURT,
COOK COUNTY.

206 I.A. 627

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

This is an undefended appeal from a decree denying leave to the complainant, Minnie E. Donnelly, to file an amended bill for separate maintenance, and dismissing her bill for divorce without equity.

The order of events with reference to pleadings was that in October, 1911, the complainant filed her bill for separate maintenance, averring repeated acts of cruelty, to which defendant filed an answer. In May, 1914, by leave of court, complainant filed her amended bill asking for a decree of divorce, which bill contained substantially the same allegations set out in the bill for separate maintenance. Defendant answered this bill. Defendant filed a cross-bill alleging desertion on the part of complainant, which complainant answered denying the alleged desertion. Subsequently, in March, 1916, complainant desiring to abandon her petition for divorce, asked leave of court to file an amended bill for separate maintenance, which bill contained substantially the same allegations set out in the original bill for separate maintenance and the amended bill for divorce, which said motion was overruled and denied.

The cause came on for hearing upon the bill for divorce and defendant's cross-bill alleging desertion. Before

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1. *Journal of the American Medical Association*, 1997; 278: 1039-1044.

[illegible]

the taking of testimony the motion for leave to file the amended bill for separate maintenance was renewed, and the court reserved its ruling thereon until the evidence was heard. After hearing the court dismissed complainant's amended bill for divorce and also defendant's cross-bill.

From the order dismissing the bill and denying her motion to file her amended bill for separate maintenance complainant has appealed to this court; no appeal has been taken from the decree dismissing defendant's cross-bill.

We are of the opinion that the chancellor was in error in denying the complainant leave to file her amended bill for separate maintenance. Upon the hearing she gave as her reason for desiring to withdraw her petition for divorce that she feared it would discredit their child to have it known that his parents were divorced. It was her right, if for any reason she did not wish for a divorce, to withdraw her bill to that end, and we can see no substantial reason why her motion should not have been allowed.

Without narrating the evidence in detail, we are of the opinion that it is ample to sustain a decree for separate maintenance. Repeated acts of physical violence inflicted upon complainant by her husband were proven. The case made out by the proof falls precisely within the terms of the statute on separate maintenance, where it is provided that a married woman who without her fault lives separate and apart from her husband may have her remedy in equity for reasonable support and maintenance. If her amended petition had been allowed and an issue made thereon by answer, under the evidence a decree as prayed for in the bill should have been entered.

Counsel for complainant here asserts that as the evidence heard under complainant's bill for divorce was suffi-

cient to warrant the entry of a decree of separate maintenance, this court may direct such a decree to be entered under the prayer of the bill for general relief. We should be entirely willing to direct the entry of such a decree if we had the power so to do, but a bill seeking a divorce and a bill seeking separate maintenance are separate and distinct proceedings brought under different statutes. We are referred to no case where it has been held that the court may grant one of these remedies in a proceeding brought specifically to secure the other remedy.

The decree dismissing complainant's bill for want of equity and the order denying complainant leave to file her amended bill for separate maintenance will be reversed and the cause remanded with directions to permit such an amended bill to be filed, and for further proceedings not inconsistent with our views herein expressed.

REVERSED AND REMANDED
WITH DIRECTIONS.

C. F. SMITH, HUGO SONNENSCHNIN
and EDWARD SONNENSCHNIN, Trustees
of the Estate of Rudolph J. Busch,
deceased,

Appellees,

vs.

SIDNEY McBOWE,
Appellant.

206 I.A. 632

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

MR. PRESIDING JUSTICE MCBURELY
DELIVERED THE OPINION OF THE COURT.

Plaintiffs brought suit in an action in forcible
detainer, and on trial the court instructed the jury to
find against the defendant. From the judgment entered on
this finding defendant appeals.

The facts are that in January, 1911, Rudolph J.
Busch, since deceased, and Frans Robert Ryd entered into a
contract whereby Busch agreed to sell to Ryd the premises
in question for \$3,750, \$100 to be paid at the time of the
execution of the contract and \$30 upon the 15th day of each
and every month thereafter, payable at the office of the
said Busch. After a certain amount was paid Busch agreed to
give a warranty deed. Said contract also provided that no
transfer or assignment thereof should be made by Ryd without
the written consent of Busch, and that no subsequent assign-
ment should be made without such written consent. There-
after Busch died, and plaintiffs are said to be the trus-
tees of his estate.

From the abstract before us it appears that there
were introduced in evidence in addition to this contract the
following documents:

"Assignment of above contract by Frans Robert

... ..
... ..
... ..

• **Explain** the importance of the following:

100

10. The following information is for your information only and is not to be used for any other purpose.

... ..

1. *De la* 1870, 1871, 1872, 1873, 1874, 1875, 1876, 1877, 1878, 1879, 1880, 1881, 1882, 1883, 1884, 1885, 1886, 1887, 1888, 1889, 1890, 1891, 1892, 1893, 1894, 1895, 1896, 1897, 1898, 1899, 1900, 1901, 1902, 1903, 1904, 1905, 1906, 1907, 1908, 1909, 1910, 1911, 1912, 1913, 1914, 1915, 1916, 1917, 1918, 1919, 1920, 1921, 1922, 1923, 1924, 1925, 1926, 1927, 1928, 1929, 1930, 1931, 1932, 1933, 1934, 1935, 1936, 1937, 1938, 1939, 1940, 1941, 1942, 1943, 1944, 1945, 1946, 1947, 1948, 1949, 1950, 1951, 1952, 1953, 1954, 1955, 1956, 1957, 1958, 1959, 1960, 1961, 1962, 1963, 1964, 1965, 1966, 1967, 1968, 1969, 1970, 1971, 1972, 1973, 1974, 1975, 1976, 1977, 1978, 1979, 1980, 1981, 1982, 1983, 1984, 1985, 1986, 1987, 1988, 1989, 1990, 1991, 1992, 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 255

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IN QUESTION FOR 1954

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1999

Ryd and Ella M. Ryd to George and Erma Watrous, and consent of trustees, Nov. 25, 1914.

Assignment of above contract from George and Erma Watrous to Walter K. Radcliffe and consent of trustees, January 23, 1915.

Assignment of above contract from Walter K. Radcliffe to Jennie M. Bronell, August 30, 1915.

Assignment of above contract from Jennie M. Bronell and Charles B. Bronell to Helma M. McBowe and Sidney McBowe, Sept. 1, 1915.

Consent of trustees to transfer and assignment of foregoing contract from Walter K. Radcliffe to Jennie M. Bronell and from Jennie M. Bronell to Helma McBowe and Sidney McBowe."

There is no question of failure on the part of any of these assignees to make the payments called for by the contract. This being the state of the record, we fail to see any reason for the peremptory instruction to the jury to find against the defendant. He seems to have been in lawful and peaceable possession of the premises and was not in default in any of the terms of the contract.

The argument of respective counsel centers around the authority of the attorney for the trustees to give the written consent to the assignments to the defendant and his wife. However this may be, subsequent thereto and after defendant had entered into possession, plaintiffs received from him a payment of the installment due on the contract, thus ratifying the action of the attorney, even if there should have been any question as to his authority.

We can see no reason in law or justice permitting this judgment to stand, and it therefore will be reversed.

REVERSED.

1992, 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2658, 2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666, 2667, 2668, 2669, 2670, 2671, 2672, 2673, 26



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10-5-66	James H. H. H.	897-1826
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